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## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### CONSOLIDATED GAS COMPANY v. STOEHR.

*Pipelines—City streets—Abutting owners—Exposure of pipes—Injunction.*

A property owner in making entrances from the street into his cellars exposed and endangered the safety of the gas mains of a gas company which extended under ground along the street. Held, that the gas company was entitled to a decree directing the removal of the cellar-ways to the extent of not endangering its gas mains.

Under the circumstances of this case it was held that upon payment within thirty days by the property owner of the cost incidental to making the pipeline safe an injunction would not be enforced.

No. 357 December Term, 1906.

Opinion by MILLER, J., specially presiding. Filed

The bill alleges that the defendant in making entrances from the street into his cellars has exposed and is endangering the safety of the plaintiff's gas mains, praying for the removal of the entrances or such a change as not to interfere with its pipeline.

#### FINDINGS OF FACT.

1. The plaintiff is a corporation created and existing under an act of the general assembly of Pennsylvania entitled, "An act to incorporate the Consolidated Gas Company," approved May 19, 1871. Under its charter it has authority to supply gaslight to the city of Pittsburgh and to such companies and individuals residing therein at prices to be agreed upon, with authority to make the necessary machinery, buildings and apparatus for the manufacture of gas and with the right to enter upon streets for the purpose of laying its pipes, altering, in-

specting and repairing the same, subject to such regulations as the councils of the city may adopt.

It obtained the consent of the proper municipal authority of the city of Pittsburgh for entering upon the streets of said city with its pipes for the conveyance and distribution of gas.

2. In the year 1893 it constructed and has since operated and maintained under its charter with the consent of the city of Pittsburgh a six-inch cast iron pipeline under Penn avenue, a public street of said city, at a distance of two and a half feet from the northerly property line thereof, which pipeline contains and conveys a large volume of gas and is used by the plaintiff in supplying gaslight to the public.

3. The defendant was in October, 1906, and still is the owner of a tract of land in the Nineteenth ward of the city of Pittsburgh, situate on the northerly side of Penn avenue, corner of Graham street, having a frontage on Penn avenue of 42 feet, upon which he erected a brick building, the lower portion of which is constructed for store-rooms and the remainder for dwellings.

He obtained permission from the city of Pittsburgh to open Penn avenue in front of his buildings for the purpose of making entrances into the cellars in accordance with the city specifications and under a city ordinance. These consist of two cellar areas, each about six feet wide, extending three feet five inches from the building line into Penn avenue on the surface, thence sloping toward the building, at the bottom of which the spaces are one foot ten inches from the building line. The sides and sloping wall are of masonry; half-way toward the top of the sloping front is the pipeline of the defendant company. It was exposed more than one-half by the sloping excavation; the defendant built a stone wall from the bottom to the under surface of the pipe,

also from the top of the pipe to the surface of the street; the stones of the masonry both in the ends and sides of the cellar entrances are built around the pipeline, but the whole is plastered and cemented, imbedding the pipeline and holding it rigid in the walls of the cellarway.

4. The defendant was not aware of the existence of this pipe until it was found when the excavation was made. He at once went to the office of the plaintiff in relation thereto and was informed not to proceed therewith unless he paid the cost of constructing a new pipeline farther out in the street. This he declined to do; in the meanwhile the work was completed before any formal demand to desist had been given. The defendant did not employ unusual means to hasten the work so as to prevent the plaintiff from obtaining proper relief.

5. The plaintiff's pipeline conveys a large volume of gas, and the proper performance of its duties to the public depends upon the constant and uninterrupted flow of said gas.

6. The defendant's cellar-ways are an interference with the plaintiff's pipeline, in that they render it more liable to break; they cause a portion of the pipeline to be exposed, so that in case of a break in the line at or near those cellar-ways the gas would rapidly discharge into defendant's building and might cause great danger to persons occupying the same; the plaintiff undergoes a greater burden in repairing and altering its pipeline by reason of the cellar-ways as now constructed; its pipeline as imbedded and held rigid in the walls of plaintiff's cellar entrances is liable to break and is dangerous in the present location if used to convey gas through the same.

7. About April 1, 1906, the plaintiff constructed a pipeline outside and around defendant's cellar-ways between the pavement and the curb connecting the same with the pipeline as formerly existing at each side of the plaintiff's houses, and said construction is now in use. This construction was for the purpose of avoiding any possible danger in permitting the gas to pass through the pipes as imbedded in defendant's cellar-ways. In constructing this additional line the plaintiff has not

abandoned its right to maintain its pipeline as located in 1893.

The cost of this construction is \$96.41.

#### CONCLUSIONS OF LAW.

1. The plaintiff has a vested interest in its pipeline as constructed in 1893 in Penn avenue in front of what is now the defendant's property, same having been made with municipal consent.

2. The plaintiff was not guilty of laches and is entitled to an injunction decreeing the removal of the defendant's cellar-ways to the extent that the same expose or rigidly imbed the pipeline.

3. But as the defendant made these openings on property in which he has an estate, the reversion being in him as an abutting property owner, without the knowledge of the close proximity of the plaintiff's pipeline to his building, and as these area-ways are necessary for entrance to his cellar, being authorized by special permit as well as by ordinance, and as the plaintiff originally agreed to make the change which is now a fact, if plaintiff paid the cost thereof, and having liquidated its entire injury by the submission of the costs thereof, it is manifest that the equities of this case do not justify the enforcement of the injunction to which the plaintiff as a general proposition is entitled to.

Under the authority laid down in *Provost v. The New Chester Water Company*, 162 Pa. 275, and *Allegheny County Light Company v. Booth*, 216 Pa. 564, we affirm the plaintiff's general right to maintain its pipeline as located by it in 1893, but we deny the application of the remedy by injunction under the circumstances unless the defendant will refuse to comply with the decree which we will enter.

This decree will provide for the payment by the defendant to the plaintiff within thirty days of the cost of the new construction of its pipeline as now located and used, with the costs of this proceeding, whereupon he may maintain the cellar entrances as now constructed without further interference from the plaintiff, except that it may, if it wishes, remove the old pipeline at its own expense and without damage to the cellar entrances as constructed.

In default thereof, as stated before, an

injunction will be awarded directing him to reconstruct his cellar entrances so as in no wise to interfere with plaintiff's pipeline as originally constructed.

For plaintiff, *Reed, Smith, Shaw & Beal.*

For defendant, *George H. Stengle.*

## Court of Common Pleas,

WASHINGTON COUNTY.

### REED v. SCHOOL DISTRICT OF BORO OF CALIFORNIA et al.

*Act of June 28, 1895, P. L. 412—Injunctions. Collection of special building tax for school purposes.*

Plain iff brought a bill for an injunction against defendants to restrain them from levying a special building tax in the borough of California, claiming that an agreement had been entered into under the act of June 28, 1895, P. L. 412, whereby the children of the borough attended the public schools at the Southwestern State Normal School and there was no necessity for a separate school building. Bill dismissed.

No. 1669 in equity. Injunction bill to restrain the collection of special building tax, etc. Adjudication.

Opinion by McILVAINE, P. J. Filed June 29, 1907.

The court, from the evidence submitted at the hearing, finds the facts of this case to be as herein set out under the head of

#### FACTS FOUND.

1. That the real defendants are the school directors of the school district of the borough of California, in this county, and are the public officers charged with the duties of providing for the education at public expense of the children of school age living within the limits of said borough, which number between three and four hundred. Years ago the school district owned a school building, but for the last thirty years have not owned any—the lot and building they previously owned having been sold about that long ago.

2. The Southwestern State Normal School, a private corporation engaged in the work of educating and training those who expect to enter the profession of teaching in the public schools and which is maintained

largely by the voluntary appropriations it receives from session to session through the action of the legislative body of our state, is situated within the limits of California borough.

3. Under an act of assembly, approved the 28th day of June, 1895, P. L. 412, the trustees of the Southwestern State Normal School and the school directors of the school district of California borough were empowered to and did enter into a contract whereby what is known as "model schools," composed of the school children of California borough as pupils, were maintained in seven or eight of the rooms in the building belonging to the former, with the teachers taken from the same; the trustees of said Southwestern State Normal School being paid by the school district so much per scholar per month for this service and the use of its building.

4. The question of the propriety of continuing this policy arose some five or six years ago when the school board of the district concluded to and did buy a lot on which at some future time a school building should be built, and gave bonds in payment thereof. They also levied a special tax of two mills to pay these bonds, and after the bonds were paid they continued each year to levy a special tax of two mills to accumulate a fund sufficient to build a suitable school building on this lot and have now accumulated and on hands a fund for this purpose amounting to about \$5,000, which is properly secured and most of it drawing four per centum interest.

5. Among the tax payers of California school district and among the trustees of the Southwestern State Normal School a difference of opinion exists as to the expediency of continuing the arrangement now existing between the normal school and the school district indefinitely or of, on the other hand, terminating it whenever the district shall accumulate or can secure by issuing bonds enough of money to build a school house on the lot they have already provided. The board of school directors as constituted for the last four or five years have favored the plan of building a school house and of terminating the present arrangement whenever they have accumulated sufficient funds to

build this new building which they say, after having had plans and estimates made by competent architects, will cost \$50,000.

6. For the school year of 1906-7 the school directors, pursuing the policy previously adopted, levied a special tax of two mills for this special building fund, and H. L. Lamb, the collector, under authority of the school directors, being about to enforce the collection of this tax against the plaintiff, Mrs. Sarah Reed, filed this bill to restrain the collection from her of said tax.

#### CONCLUSIONS OF LAW.

1. That the school directors have power to levy a special tax from year to year to accumulate a fund sufficient to build a new school building when such building in their opinion is reasonably necessary.

2. That whether it is necessary to build said building is a question solely within the discretion of the board to decide, and the court cannot be called upon to control this discretion except upon the allegation that the board is acting in bad faith.

3. That the evidence in this case is not sufficient to show bad faith, but only reveals an honest difference of judgment as to which policy is the better, to indefinitely continue the present arrangement with the Southwestern State Normal School or build a new school house when sufficient funds are accumulated and then terminate it.

4. That the plaintiff's bill should be dismissed at her costs.

#### COMMENTS.

The remedy by injunction is a valuable one and the propriety of invoking it to restrain threatened unlawful acts or acts prejudicial to the rights of individuals or the public cannot be questioned, but "government" by injunction is pernicious and should never be attempted by the courts. Whether a special tax shall from year to year be levied in the school district of California to accumulate a fund sufficient to build a school house, it being admitted that the district has near four hundred children of school age and has no school house, is a question of governmental policy committed to the decision of the school board elected by the people of the district and not a judicial question to be determined by the courts. We might believe that the present

arrangement with the Normal school is cheaper to the taxpayers and affords better facilities for the education of the children of the borough than will be afforded in a new building; but we have no authority to so decide, and if we had, our judgment on the question, other things being equal, would not likely be as near correct as those who are in close touch with the matter to be decided.

And now, June 29, 1907, it is ordered that this adjudication be filed and notice of the filing be given the parties, and if no exceptions be filed sec. leg. that a decree be prepared dismissing the bill at the plaintiff's costs.

For plaintiff, *Boyd and E. E. Crumrine.*

For defendant, *Parker, McIlvaine & Clark.*

[From Harry Russell Myers, Esq., Washington, Pa.]

(Common Pleas, Washington County.)

### MURPHY et al v. THE COUNTY OF WASHINGTON.

*Motion for new trial—Motion for judgment non obstante veredicto—Act of June 26, 1905, P. L. 336—Road improvements—Assessment of Damages—Appeal from award of viewers.*

A was the owner of a farm through which the county of Washington improved under the act of June 26, 1905, P. L. 336, a township road, making cuts and fills, but not taking or appropriating any additional land. Viewers were appointed and assessed damages. Defendant appealed and jury awarded damages. On motion for new trial and judgment non obstante veredicto on grounds that no land was "taken, used or appropriated," motion for judgment non obstante veredicto and motion for new trial overruled.

No. 77 February Term, 1906. Trial on appeal from award of viewers to assess damages under act of June 26, 1895, P. L. 336. Motion for new trial and judgment for defendant *non obstante veredicto*.

Opinion by McILVAINE, P. J. Filed June 24, 1907.

The plaintiffs in 1905 owned a farm containing about 200 acres in this county through which ran a public road of the width of fifty feet and which was under the control of the supervisors of the township of Canton in which the farm was situated. By proper

proceedings under the act of June 26, 1895, P. L. 336, this road was on the — day of —, 1905, decreed a county road and was shortly thereafter permanently improved by the county commissioners. In making the permanent improvement of the road the county commissioners bettered the grade, some of the higher places were cut down and some of the lower places were filled up. One of the cuts was in front of the farm buildings, and as the plaintiff's claim, rendered the access to the house and barn from the public road more difficult than it was before.

No land of the plaintiffs was *taken, used or appropriated* in making the improvement outside the limits of the fifty feet occupied and used by the public as a road when it was under the control of the township supervisors *except as follows*: First, the bridge over Chartiers creek on the road which was reconstructed by the county commissioners had a wing-wall built which extended beyond the limits of the road and covered about eight or ten square feet of ground outside its limits near the creek bank and of little value; second, the approach from the old township road to the plaintiffs' barn, was up a road through the barnyard that was not of a uniform grade; the county commissioners when they made the cut in the public road in front of the entrance into the barnyard graded the plaintiffs' road into the barnyard and made it of a uniform grade. The soil that was taken off in doing this grading in the barnyard was hauled and dumped into one of the fills in the public road. But a few loads of soil were thus taken. In the plaintiffs' statement no specific claim is made for the few feet of ground occupied by the end of the wing-wall of the bridge, and in making claim for the soil taken no amount is specified. The plaintiffs' claim for damages is evidently not found in these two items; they indeed may be considered substantially out of the case as it was tried. The substantial damage done as claimed by the plaintiffs was to the farm outside of the limits of the road and therefore their claim is not, strictly speaking, for damages for land "taken, used or appropriated," but for consequential damages for injuries done the land not taken; but the

manner in which the improvement was made, that is, damages done as a consequence of the change of the grade of the road in front of the house and barn and at one or two of the field entrances.

This brings us to the legal question that was raised and reserved at the trial and upon which the motions now before us must turn.

The case before us is an appeal from the award of viewers appointed under the 5th section of the act of 1895, above referred to, and must be within the provisions of that act if judgment is entered on the verdict of the jury. If the viewers were improvidently appointed and had no jurisdiction to assess the consequential damages sustained by the plaintiffs, then this court on appeal has no jurisdiction to enter judgment on the verdict of the jury and must grant either one or the other of the defendant's motions.

The defendant's counsel contends, first, that the land taken out of this farm and occupied by the public prior to 190— for a road was not "taken, used or appropriated" by the county commissioners in 190— so as to entitle the plaintiffs to damages "for property taken, used or appropriated" for the reason that the land had long years ago been taken, used and appropriated for the use of a public highway and that the change made by the legislature as to the municipality that should be responsible for the maintenance of the highway in no way could affect the rights of the traveling public in that road long since laid out and that the plaintiffs when they bought their farm bought it subject to the rights of the public to a road fifty feet wide across the farm on the ground then occupied by the road.

The defendant's counsel contends, second, that the act of 1895 does not provide for the appointment of viewers to assess damages unless land has been "taken, used or appropriated" and that no damages can be assessed for injuries except those connected with the taking, using and appropriating of land, or in other words that viewers cannot be appointed under the provisions of the act of 1895 to assess consequential damages such as might result from the change of grade of a public road already laid out through a farm.



The first contention is in our opinion well founded and we so find and hold. The public road across the plaintiffs' farm when they bought it was for the use of the citizens of the commonwealth and those who were sojourning within its borders. It, like all other roads, had been laid out by authority of the commonwealth. The manner of its being laid out and the manner of its maintenance were matters that in no way affected the rights of the public to use the road. The sovereign commonwealth can open public roads or streets directly or it can delegate that power to subordinate municipalities. And roads whether opened by the state or a township or a borough or a county under authority delegated to them by the commonwealth are for the use of the public at large. The act of 1895 and what was done under it therefore did not curtail the rights of the public in the road across the plaintiff's farm, it only changed the management of the road from the township to the county and provided for its *permanent improvement*. We take it therefore that so far as the land within the limits of the original road is concerned, the county of Washington did not "take, use or appropriate" any of it in the sense in which those words are used in the act of 1895, nor was any soil, removed by the cuts and used in the fills, which was within the limits of the road, "taken, used or appropriated" within the meaning of the act of 1895.

The second contention in our opinion is not well founded and we so find and hold.

The 6th section of the act of 1895 indicates the duties of the viewers appointed under its provision in these words: "Having viewed the properties connected with and affected by the said proposed improvement, shall hear all the parties interested and their witnesses and having due regard to the advantages and disadvantages, shall estimate and determine the damages, if any, for the property taken, used or appropriated and to whom the same are payable" \* \* \* and with their report "file a plan showing the properties acquired, taken, used and appropriated for the purpose aforesaid." \* \* \*

This section standing alone might be construed so as to sustain the contention of the defendant's counsel, but there are several

other sections in the act that relate to the question of damages and they should be considered with the 6th section. Before referring to them let us recall, however, the provision of our present state constitution on the question of damages where damages have been done by municipal and other corporations in making public improvements. It provides that just compensation shall be made whenever land is "*taken, injured or destroyed*." Keeping this in mind, we turn to the third section of the act of 1895 and we find that the county commissioners are empowered to agree with the parties interested and to pay them out of the county funds for "damages sustained or which seem likely to be sustained by reason of the *taking, injuring or destroying* of such property." In the 10th section in providing for an appeal we find the legislature using this language: "Any party whose property is taken, injured or destroyed may appeal from the report of viewers and demand a jury trial."

There are two ways of construing the language of those two sections (the 3rd and 10th) taken in connection with the 6th section. The first is that of the defendant's counsel, that is to make the 6th section the controlling one and the others subordinate to it and arrive at the conclusion that *no jury* can be considered by the viewers or by the court on an appeal except such as result from the taking, using or appropriating of land as indicated in the 6th section and that this would exclude consequential injuries where no land is taken, used or appropriated, such as the injury to the plaintiff's house caused by the cut in front thereof, wholly within the limits of the old road.

The other construction is to hold that the 3rd and 10th sections are to be taken as giving the key to the interpretation of the 6th section, and that the 3rd and 10th sections clearly indicate that damages to the extend that they are allowed by our state constitution were intended by the legislature to be embraced in those that the viewers appointed under this act could assess.

The latter construction we hold to be the correct one.

The viewers, "having due regard to the advantages and disadvantages shall estimate

and determine the damages, if any, for the property taken, used or appropriated," is the language of the 6th section, and taking the constitutional provision and the 3rd and 10th sections, is it not a reasonable interpretation of this language to hold that it means that the viewers are to also consider the consequential benefits and injuries to the farm outside of the land taken as well as the land taken, used or appropriated?

Under the authority of the case of the *County of Chester v. I. J. Brower*, 117 Pa. 647, there can be no doubt that the county of Washington is within the meaning of the constitutional provision referred to and that the improvement made by the county in the case at bar is also within its meaning.

The language of the constitution is: "Municipal and other corporations. \* \* invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their \* \* highways or improvements."

This case holds that a county comes within the meaning of the words, "municipal and other corporations," and the consequential injury done to abutting property by the building of a high wing-wall of a bridge on the street on which the property abutted and thus raising the level of the street above the level of the abutting property is such injury as is contemplated by this constitutional provision.

If the consequential injury done to the plaintiffs' dwelling house is not included in the damages that the viewers appointed could assess, then we would have two proceedings to ascertain the damages done plaintiffs' farm, and view to ascertain the damage done by the taking of a few feet of land for the wing-wall and a few loads of soil taken out of the farm and placed in one of the fills, and after this an action on the case, as in *Chester County v. Brower*, *supra*, to recover the consequential damages done by changing the grade of the road in front of the dwelling house.

We cannot think that the legislature when it provided a tribunal to assess the direct damages for land actually taken intended to turn the land owner over to his action at law to recover the consequential damages he

had suffered. They should be considered together and passed upon by the same tribunal. We therefore hold that we make no mistake in trying this case as we did, and the defendant's motion for judgment *non obstante veredicto* and his motion for a new trial must both be overruled.

And now, June 24, 1907, motion for judgment *non obstante veredicto* and motion for new trial overruled.

For plaintiff, *Miller & Miller* and *R. W. Irwin*.

For defendant, *James I. Brownson*.

[From Harry Russell Myers, Esq., Washington, Pa.]

## Court of Common Pleas,

DAUPHIN COUNTY.

### COMMONWEALTH v. ALLEGHENY COUNTY.

*Fees—County treasurer's commission—Collection of personal property tax—Acts of 1831, 1840, 1889—Art. XIV, Sec. 5, Constitution of Pennsylvania.*

The treasurers of the several counties of the commonwealth who are not salaried are entitled, under the acts of 1831, P. L. 20; 1840, P. L. 612, and 1889, P. L. 420, to retain for their services, in connection with the collection and payment of the tax on personal property into the state treasury, a commission of one per cent on the amount collected.

Under Art. XIV, Sec. 5, Constitution of Pennsylvania, and the act of 1876, P. L. 13, county officers who are salaried shall pay all fees receivable to the county as the property of the county, and such county treasurer is not entitled to retain commission for the collection thereof. *Phila. v. McMichael*, 208 Pa. 297.

The case of *Phila. v. McMichael*, 208 Pa. 297, recognized the validity of the proviso of the act of 1889, P. L. 420, which authorizes the retention of the commission by the treasurer, but the effect of that case is that the treasurer of Philadelphia county was not entitled to retain the commission for his own use, but received it for the use of the county, and the commission belonged to and was payable to the county of Philadelphia, and that the commonwealth was not entitled thereto.

No. 338. Commonwealth Docket, 1905.

Opinion by KUNKEL, P. J. Filed December 7, 1906.

This is an appeal from the settlement of the auditor-general and state treasurer against the county of Allegheny for tax on personal property for the year 1904. It was tried by the court without a jury under the provisions of the act of April 22, 1874.

The facts have been agreed upon by counsel, and we find them to be as follows:

#### FINDINGS OF FACT.

1. The county of Allegheny has and had, during the tax year 1904, a population in excess of one hundred and fifty thousand, and the treasurer of the county receives a salary in lieu of fees, commissions and other emoluments under the provisions of the act of March 31, 1876, P. L. 13.

2. All of the personal property tax assessed and settled against the county for the tax year 1904, in the settlement appealed from has been paid by the county, except the sum of \$5,630.11, which sum is equal to one per centum upon the gross amount of tax.

3. Up to and until the year 1905, and prior to the decision in the case of *Philadelphia v. McMichael*, 208 Pa. 297 (1904), it was the practice of the accounting officers to permit the deduction of the one per centum, treasurer's commission, from the gross amount of personal property tax settled against counties having a population in excess of one hundred and fifty thousand inhabitants.

#### DISCUSSION.

Section 17 of the revenue act of June 1, 1889, P. L. 420, provides: "That the taxes imposed upon personal property by the first section of this act shall be collected by the several counties and cities, and on the first Monday of September shall pay unto the state treasurer all such sum or sums of money as may then have been collected, and shall on the second Monday of November immediately following in each year complete and pay unto said state treasurer the whole amount remaining unpaid; and, in default thereof, it should be the duty of the auditor-general to add ten per centum penalty to each county or city on all taxes remaining unpaid on the second Monday of November of each year, which shall be charged in the duplicate against each delinquent taxpayer in arrears on and after said day; provided,

that city or county treasurers shall be permitted to retain for their own use from the gross sum of money paid by them into the state treasury the commission named and prescribed by existing laws."

The language of this section is plain. It directs that the taxes on personal property collected by the treasurers of the several counties shall be paid into the treasury of the state, fixes the time when the payments shall be made, and authorizes the treasurers of the counties to retain for their own use from the gross sum thus collected and payable to the state the commissions prescribed by existing laws.

The laws which prescribe the commission which the treasurers shall receive are section 8 of the act of March 25, 1831, P. L. 20, and section 7 of the act of June 11, 1840, P. L. 612. The former is the original act upon the subject and the latter is in substantially the same language and provides in part as follows: " \* \* \* and it shall also be the duty of the treasurer of each county, upon the settlement of his account, as aforesaid, to pay into the treasury of the commonwealth the amount received by him, for which he shall be allowed one per cent upon the amount so paid."

Under this legislation there can be no doubt that the treasurers of the several counties of the commonwealth are entitled to retain for their services, in connection with the collection and payment of the tax on personal property into the state treasury, a commission of one per cent on the amount collected; and it is conceded that until the refusal of the commonwealth to allow the commission in the present case, it has always been permitted to be deducted on settlements against counties of the first class.

The commonwealth, however, contends that because it was held in the case of *Philadelphia v. McMichael*, 208 Pa. 297, that the treasurer, acting as he does, with respect to the collection of this tax, only as a county officer (*Com. v. Philadelphia Co.*, 157 Pa. 531), is not entitled to the commission for his own use, the commission, therefore, may not be retained, and that the whole sum collected must be turned into the state treasury. The defendant, on the other hand, contends that the case referred to does

not relieve the commonwealth from the payment of the commission, but decides that it belongs to the county, and that, therefore, when the county has paid over the sum collected, less the commission, it has paid to the commonwealth all that is due. We are unable to see the force of the commonwealth's contention. *Philadelphia v. McMichael* was a proceeding on the part of the city to recover the commissions retained by its treasurer, and a recovery was sustained. The right to recover necessarily involved the right of the city to the commissions. It cannot be said that the city recovered because it showed that, under the law, the treasurer was not entitled to them. It could recover only on the theory that the commission belonged to it. The case, therefore, instead of supporting the contention of the commonwealth, in our opinion, is decisive against it. It is clear from an examination of the case that the validity of the provision of the act of 1889, which authorizes the retention by the treasurer of the commissions, was recognized, but it was held that, so far as the attempt was made to give the commissions to the treasurer for his own use, it was ineffectual because of the mandate contained in Art. XIV, Sec. 5, of the Constitution, and of the act of assembly of March 31, 1876, P. L. 13, enacted to carry the constitutional provision into effect, which expressly provides that all fees receivable by county officers who are salaried shall belong to the county, and shall be paid to the county. The effect of that decision is that the treasurer is not entitled to retain the commission for his own use, but receives it for the use of the county. How, then, can it be successfully maintained that the county has not the right to it? We are satisfied that the commissions under the legislation referred to and under the case of *Philadelphia v. McMichael* belong to and are payable to the county.

The argument founded upon the language of section 16 of the act of 1889 and its amendment of June 1, 1891, P. L. 229, which provide for the division of the tax between the county and the state, that three-fourths of the net amount of tax shall be returned to the counties, confirms the view that the commonwealth has no lawful claim to the whole tax. The use of the term net

amount signifies that the gross sum is not to be paid to the state, and as no other deductions are allowable (proviso section 3, amendment of 1891), except the commission authorized to be retained by the treasurer, it follows that the state is to receive the amount less the commission, and is, therefore, not entitled to it. And this is so, whether the commission be retained for the use of the treasurer or for the use of the county. It is manifest that there is no provision in the law that the state shall have it.

It is suggested that if the view which we have expressed be adopted, the distribution of the tax between the commonwealth and the respective counties (section 3, amendment of 1891) will be made inequitable. The distribution, no doubt, was made in contemplation of the retention by the treasurers of the commission for their own use, yet if the provision of the act which gives the commission to the treasurers for their own use cannot be carried out in every case, but has the effect of giving it to some of the counties and not to others, and thereby inequity results, the remedy must be found with the legislature.

#### CONCLUSIONS OF LAW.

1. We therefore conclude that the commonwealth is not entitled to the gross sum of taxes on personal property for the year 1904, collected by the treasurer of Allegheny county, but is entitled only to that sum less the commission of one per cent.

2. That the county of Allegheny is entitled to the commission of one per cent on the gross sum collected, and that, as the amount collected, less the commission, has been paid and the balance claimed upon this settlement represents the commission retained, there is nothing further due the commonwealth from the county on that account.

Judgment is therefore directed to be entered in favor of the defendant, unless exceptions be filed within the time limited by law.

For plaintiff, *Hampton L. Carson*.

For defendant *F. M. Eastman and Geo. H. Calvert*.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

### Oklahoma Constitution.

The recently drafted Oklahoma Constitution presents about the most peculiar amalgamation of theories that this country of constitutions can furnish. As summarized by one writer it includes:

"The initiative and referendum; direct nomination of all officers by the people; prohibition of succession in State offices; prohibition of the sale or introduction of liquor into the state; 2-cent railroad fares; partial women-suffrage; prohibiting ownership in any production agency of a natural commodity by a railroad; prohibiting corporations from more land than is absolutely necessary in the operation of their business; prohibiting corporations from dealing in real estate outside of incorporated cities; prohibiting the issuance of watered stock, and requiring the books of all corporations to be open for inspection at all times; provision for the state ownership of the segregated mineral lands in Indian Territory; a compulsory and separate school system; commissions to deal with charities, labor and arbitration, insurance, railroads, agriculture, gas, coal, oil, and mines; defining the term negro; prohibiting the marriage of negroes with whites; and finally, providing that the constitution may be amended by a majority vote." The brightest gem of the entire cluster is the last clause which permits the community to smash everything to flinders at any time it may see fit to do so. It cannot be said that the legislators of Oklahoma are unwilling to trust their constituents. At all events, it opens an easy path of retreat, for if objection is made later on, it can readily be asked "well, why don't you change the law?" What's the Constitution between friends—in Oklahoma?

This furnishes one of the best illustrations of the modern tendency to cure all evils by legislation. What matters it that affairs are left in a worse condition than they were in before—that it will be comparatively easy to observe the letter while violating the spirit. We are happy in our delusion that the moment an act is passed, the wrong is righted. By and by we will awake, but at present there are no signs of the awakening.—*The American Lawyer.*

A statute fixing the time for the termination of a term of court is held, in *Texas Tram. & L. Co. v. Hightower* (Tex.) 6 L. R. A. (N. S.) 1046, to refer to sun time.

The unsupported denial of the grantor is held, in *Ford* (App. D. C.) 6 L. R. A. (N. S.) 442, not to be sufficient to impeach a deed properly signed and acknowledged.

Consent by a chattel mortgage that the property shall be taken out of the state in which the mortgage was given is held, in *Jones v. North Pacific Fish & Oil Co.* (Wash.) 6 L. R. A. (N. S.) 940, to be a waiver of the mortgage as against every person except the mortgagor.

A covenant by the purchaser of the water rights upon a parcel of land, with the vendor, who is the owner of an adjacent lot, to carry and convey sufficient water to the residence of the covenantee for the ample use and accommodation of such residence and its occupants, is held, in *Atlanta, K. & N. R. Co. v. McKinney* (Ga.) 6 L. R. A. (N. S.) 436, to run with the land, and to bind the successor in title of the covenantor.

Persons who undertake to carry on a dentistry business in violation of local law, under a charter obtained in another state, are held, in *Mandeville v. Courtright* (C. C. A., 3d C.) 6 L. R. A. (N. S.) 1003, to be personally liable for injury inflicted by the incompetence of their employee, upon a patron who submits himself to treatment without knowing the pretended corporate character under which such persons are operating.

**REGULATION OF COMMERCE.** The legality of a state railroad commission's regulation requiring a railroad company to stop its interstate mail trains at specified county seats where proper and adequate railway passenger facilities are otherwise afforded is questioned in *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 27 Supreme Court Reporter, 90. The court holds that this is virtually a regulation of interstate commerce, and that the ruling of the commission is unconstitutional.

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No. 2.

PITTSBURGH, PA., JULY 24, 1907.

## Orphans' Court, ALLEGHENY COUNTY.

### In re Estate of DAVID S. WILSON, Deceased.

*Wills—Letter accompanying will—Precatory trusts—Executor—Purchase of testator's estate—Commissions—Fraud.*

Testator after making certain bequests left the balance of his estate to W, his brother, who was made executor. On the same day he wrote a letter to W, which was found in the box with his will, in which he "wishes" W to pay certain sums to B, which he says he feels "assured you (W) will try to carry out." The devise to W was an absolute one, and the effect of the letter, if carried out, would abrogate the devise and vest testator's estate in B instead of W. Held, that there was no trust condition imposed upon the executor by the requests of the letter and B was not entitled to share in testator's estate.

The test in such a case is whether the words of the letter express merely the testator's wishes or whether they express his will; where an absolute estate is in terms given, precatory words which follow are treated as expressing the wish rather than the will.

The fact that W treated B as the residuary legatee and conveyed to her part of the estate does not estop him from asking for a judicial interpretation of the papers or legally bind him to turn over the balance of the estate to B.

The fact that an accountant purchased from a legatee certain personal property coming to her out of the estate at the appraised value and sells them to a third person to whom it had been offered, at an advance, is not of itself evidence of fraud or a violation of the trust relation.

No. 76 May Term, 1907.

Opinion by MILLER, J. Filed June 28, 1907.

The questions are,

(a) Whether testator's absolute devise of his entire estate to his brother is abrogated

by the terms of a letter probated with his will requesting a different disposition which in effects vests his entire estate in his cousin, Miss Mary M. Baird; and

(b) Whether the brother as executor should be surcharged with commissions on the ground of bad faith and fraud in the purchase and sale of a collection of valuable coins belonging to the decedent.

#### THE FACTS.

David S. Wilson, the testator, in 1876 retired from the practice of law in Washington county, this state, and with his brother, Robert K. Wilson, maintained their home together on an estate jointly held by them at Leetsdale, this county.

He had been a widower for many years and had no children. Miss Baird is a niece of his deceased wife, and is also a second cousin. She made her home with the two brothers and became their housekeeper.

He was possessed of a considerable estate; the account filed shows personal property of \$101,190.15, the great bulk of which is for distribution. In addition he owned different tracts of valuable real estate.

He died on the 19th of February, 1906, leaving the following will.

"I, David S. Wilson, of Leet township in the county of Allegheny and Commonwealth of Pennsylvania, do make and publish the following as and for my last will and testament:

"I direct the undivided portion of the estate of Maria Wilson to be distributed as though I had died before that testatrix, thus giving my interest to the other members of our family in proper proportions.

My real estate wherever situate I devise to my brother, Robert K. Wilson, his heirs and assigns; and my personal property I bequeath to the said Robert K. Wilson.

Of this will I nominate and appoint the said Robert K. Wilson to be the executor.

Witness my hand and seal July 13, 1892.

D. S. WILSON. [Seal]"

In the box where the foregoing will was found, but not attached to, or connected with it, was the following letter:

"My dear brother Robert:

"Out of the estate left you by my will of this date I want you to do as follows:

"Give H. M. Dougan my law library at Washington.

"Let Mary M. Baird take what she desires of my clothes.

"Let John C. Wilson have what he chooses of my books and instruments.

"Give Layton & Lucy each \$100.

"Give Alice & Johnny each \$50.

"Pay to Mary M. Baird as realized 40,000.

"Then pay to Isaac W. Natchet 1000. To George B. Johnson 1000. To Sue, Jane & Ellen Baird each 1000.

"Of the balance after the foregoing distribution keep for yourself not exceeding 10,000 and give the rest to Mary M. Baird.

"I have written the will as you find it so as to save all the trouble possible and feel assured you will try to carry out my wishes.

"Very Affly,

"D. S. WILSON,

"July 13, 1892.

"To R. K. Wilson, E q."

The will and letter were duly probated together, and letters testamentary granted thereon March 16, 1906, to Robert K. Wilson.

The requests in the letter to the extent of all the smaller amounts therein named have been paid on checks drawn by the accountant, generally to the order of Miss Baird, after conference with her, and \$7,500 has been paid to her, all of which payments are credited in the account.

In addition, the accountant by deed dated May 15, 1906, has conveyed to Miss Baird for the consideration of one dollar, decedent's undivided one-half interest in three tracts of land in Washington county, the first, located in South Strabane township, containing one hundred acres; the second, located in Chartiers township, containing nine acres; the third, located in Blaine township, containing one hundred and sixteen acres.

On the same day, for the same consideration, he conveyed to her the decedent's undivided 13-24 interest in 696 acres of land in Hocking county, Ohio. On the same day he conveyed to her decedent's undivided one-half interest in two tracts of land in the borough of Leetsdale, the one containing fifteen acres, the other one hundred and twenty-one perches, and received from her a deed for the title so conveyed for the same property, paying her the consideration of \$30,000. This latter tract is the homestead, jointly owned and occupied by the decedent and Robert K. Wilson. All

the deeds to Miss Baird recite that they are made in pursuance of the requests contained in testator's letter above referred to.

The decedent was a collector, and died possessed of a large quantity of valuable coins, most of which were in his box in the Fort Pitt National Bank; others were scattered about in the home; they were collected and appraised at their face value of \$5,200.

The accountant dealt with Miss Baird as residuary legatee, and as to these coins told her they belonged to her, took her to the bank and had the box opened in which they were gathered and pointed them out to her; the key to the box remained in his possession.

Sometime after they were appraised he offered to buy them from her at the appraised value; but shortly thereafter withdrew his offer. Miss Baird then in July or August, 1906, opened correspondence in Washington, D. C., for the sale of these coins; but nothing was done by her in this direction, as she did not desire to sell them at auction, which seemed to be the information she obtained there. Then she took up the matter of further disposing thereof with D. Leet Oliver, a relative, to whom she offered them for \$5,200; he declined to purchase; then she offered them to S. Hudson Chapman of Philadelphia at the appraised price; he accepted her offer; she communicated this acceptance to the accountant, who thereupon purchased them from her and paid the appraised value thereof of \$5,200. Some weeks later he sold this collection to Chapman for \$8,088; the latter by extensive advertising, elaborate cataloguing, and as he states, an unexpected bidding for the coins at public auction, realized the sum of \$15,000.

Through D. Leet Wilson, another brother, in behalf of Miss Baird, the attention of these coins had been brought to Mr. Chapman, and he was asked to state the conditions upon which he would dispose of them. The charges indicated by Chapman were a fee of \$500 for examination and arrangement of the coins, all expenses of cataloguing and advertising, and twenty-five per cent commissions. Chapman had estimated them worth \$12,000 at public auction;

deducting advertising, cataloguing and commissions, the expenses above enumerated would have netted about \$9,000 if they had been disposed of through his firm by public auction under normal conditions.

In addition to the ordinary labor and responsibility incident to the settlement of this estate, the accountant and his counsel performed much labor in settling the decedent's account as executor of the estate of Eliza Shields.

#### OPINION.

The will of David S. Wilson is a formal instrument, declared by him to be his last will and testament; it clearly and concisely disposes of his entire estate to Robert K. Wilson.

After its execution he wrote the letter, he so says. In it he "wants" the devisee to do certain things, "out of the estate left you by my will." His "wishes" as expressed in the letter he felt "assured you will try to carry out."

There is no attempt by the testator to re-devise the estate already devised to his brother. The will concerns itself wholly with the disposition of the testator's estate; while the letter is a request that the devisee do certain things with the estate now made over to him.

The letter is a re-affirmation of the will, for he says, "I have written the will as you find it in order to save all the trouble possible." There is no suggestion that it is a codicil to the will, or is to be considered a part of it. The fact that it was probated does not make it either a will or a modification thereof: *Wall v. Wall*, 123 Pa. 545; *Bowlby v. Thunder*, 105 Pa. 173.

Granted that its probate impresses it as a testamentary paper, there is no trust or condition imposed upon the executor by the terms of the letter; the requests or desires therein expressed are in precatory words; they are to be effected only as such through the agency of the original legatee, following the absolute gift to him, and Miss Baird cannot assert the condition of a trust enforceable by decree: *Whelen's Estate*, 175 Pa. 23.

Words of trust and confidence without more do not create a trust, or turn the devise into a trust: *Boyle v. Boyle*, 152 Pa. 113. They are not sufficient prima facie to con-

vert a devise or bequest into a trust: *Pennock's Estate*, 20 Pa. 280; so in *Ketter v. Jenks*, 43 Pa. 445; *Beck's Appeal*, 46 Pa. 527; *Church v. Disbrow*, 52 Pa. 219; *Hopkins v. Glunt*, 111 Pa. 287; *Presbyterian Missions v. Culp*, 151 Pa. 469.

"The modern rule," says *Gardner on Wills* 536, citing *Pom. Eq. Jur.* 1018, "is that in order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in the ordinary manner."

The test is whether the words express merely his wishes or whether they express his will; where an absolute estate is in terms given, precatory words which follow are so treated as expressing the wish rather than the will: *Whelen's Estate*, *supra*. *Gardner* lays down the further general doctrine that where the testator makes an absolute devise, his intention not set forth in the will that the devisee should hold the property in trust for others, cannot be enforced though the devisee acknowledge the trust in writing and defines its extent.

Says *Schouler on Wills* 1136, "the current of the decisions both in England and in the United States indubitably shows that precatory trusts are not to be favored, nor is their extension to be encouraged by the courts." In *Good v. Fichthorn*, 144 Pa. 287, it is said that "as it must unequivocally appear that the testator meant to limit the estate, it has been uniformly held that no precatory words will be sufficient." There, as here, an absolute fee was given with the desire that the devisee by will dispose of any unconsumed residue; it was expressed in language far more mandatory than we find in this letter; the request was held not enforceable. To the same effect is the doctrine in *Am. & Eng. Enc. of Law* 1165.

If, then, precatory words in the will itself fall short of constituting a trust enforceable at law, it is manifest that as to this letter, separate and distinct from the will, constituting no part of it, that there was no intent on the part of David S. Wilson that the



devise to his brother was in any way limited or subject to any claim as of right by Miss Baird, or anyone else.

It is incredible that the testator, a trained lawyer, in the drawing of his own will, which is a model, wherein he devised absolutely, without limitation, his entire estate to his brother, should with the same hand, at the same time, absolutely destroy what he had just done, making his brother a legatee only to the extent of ten thousand dollars and conferring a fee upon Miss Baird. If he had intended a trust he would have said so; he knew what was required. If he had intended the letter as a codicil to his will, why did it concern itself only with the estate in Robert K. Wilson? If he had intended the letter to take the place of his will he would not have said therein, referring to his will, "out of the estate left you" I want you to do certain things. If he intended one thing by his will, and another by the letter in precatory language, defined not to be sufficient to create a trust, it was worse than confusing to state the will was written "to save all the trouble possible." This trained lawyer did not intend, by the letter, to devise to Miss Baird "the rest" of an estate already given to Robert in language requesting Robert to "give" it "out of the estate left you by my will."

In *Bowlby v. Thunder*, *supra*, a significant fact showing the intent of the testator, says the court, is the intervention of a blank page between the will and the subsequent precatory requests. Here is a separate paper, not attached to or connected in any way with the will, executed not under seal as the will is, clearly showing an entirely different intent in the testator's mind, to wit: that the will disposed of the estate; the letter was a personal memorandum for the devisee's consideration alone. All that the case of *Denny v. Barton*, 2 Phillimore 346, decided was that the letter should be probated, as has been done here; its construction was not passed upon, and the case is no authority for assuming that the language of the letter was a mandatory direction.

It is earnestly contended that as the accountant treated Miss Baird as the residuary devisee, believing he was bound by the terms of the letter, and in pursuance thereof

conveyed to her large interests in real estate, and paid her on account certain portions of the residue of the estate, that he is bound by his own construction, citing *Hagerty v. Albright*, 52 Pa. 274; *Santee v. Santee*, 64 Pa. 473; *Follmer's Appeal*, 37 Pa. 121. We do not think the cases cited, or the recent acts of the executor, estop him from asking for a judicial construction of these papers, or legally bind him to turn over the rest of the estate devised to him.

It is not our duty to pass upon the discretion which Robert K. Wilson has exercised. Apparently he had tried to carry out his brother's wishes; so far his efforts have resulted very beneficially to Miss Baird. What he may do in the future is not our concern. We are called upon to construe David S. Wilson's will, and the effect of the requests contained in his letter. We have no hesitancy in concluding that the will governs, vesting the entire estate in the devisee, and that under the letter Miss Baird has no claim for the enforcement by decree of any portion thereof.

The conclusions reached do not require consideration of the exceptions filed; but in case we are mistaken, and this estate belongs to Mary M. Baird instead of to Robert K. Wilson, then the exceptions are pertinent, and they will be briefly referred to.

As intimated at the close of the hearing, the testimony is not sufficient to work a surcharge of the executor for commissions; he has performed valuable services, for which and for the measure of responsibility which this executorship carries, the charge made by him of three per cent is not exorbitant.

Nor do we think the evidence is sufficient to convict him of fraud or bad faith in the purchase and sale of the coin collection. The measure of duty upon a trustee is clearly defined and need not be elaborated upon. If his purchase without authority was obtained by fraud, it is absolutely void. And if there were any abuse of this trust relation to her, he should be chargeable therewith; *Spencer's Appeal*, 80 Pa. 317; *Greenfield's Estate*, 14 Pa. 489.

But the weight of the testimony in this case does not indicate fraud, or abuse of a trust relationship, or concealment resorted to by the accountant. Miss Baird treated

these coins as belonging to her, and offered to sell them at their appraised value to the accountant, to Oliver and to Chapman before they were finally taken by the accountant himself. If under the facts as they exist the accountant had asked for authority to purchase this collection at their face value, after notice to Miss Baird and her acquiescence therein, it would have been granted; what would have been previously authorized may be subsequently ratified: *Grimm's Appeal*, 105 Pa. 375.

This transaction shows that these parties met each other on equal footing. Miss Baird knew or was bound to know what best result could be obtained for this collection; she certainly was not deceived by the accountant, and she had able counsel whom she could have consulted. If she had sold them to either Oliver or Chapman she could not come here and complain; her claim does not rise higher against the accountant under her own statement of facts. She had written a letter accepting Chapman's offer at the same price she sold them to the accountant; she re-opened the subject with the accountant long after he declined to purchase.

The exceptions are dismissed, and a decree will be entered awarding the entire fund to Robert K. Wilson.

For accountant, *Patterson, Sterrett & Acheson*.

For respondent, *Watson & Freeman*.

### Court of Common Pleas,

WASHINGTON COUNTY.

DEARMIN v. DEARMIN.

*Divorce—Desertion—Act of March 13, 1815, 6 Smith's Laws 286.*

To entitle one to a divorce on the grounds of desertion proof must be made of a wilful and malicious desertion and absence from the habitation of the other without reasonable cause for and during a continuous period of two years. A. brought an action for divorce against B. on the grounds of desertion, alleging an absence without reasonable cause for a period of more than two years. B. filed an answer alleging that she absented herself from her husband on account of his abuse. Divorce refused.

No. 102 November Term, 1906. Libel

in divorce alleging desertion under the act of March 13, 1815, 6 Smith's Laws 286.

Opinion by TAYLOR, J. Filed June 28, 1907.

To entitle one to a divorce under the act of March 13, 1815, 6 Smith's Laws, 286, wilful and malicious desertion and absence from the habitation of the other without reasonable cause for and during a continuous period of two years must be shown, and to prove this the burden is cast upon the one seeking a divorce, not only to show a separation but to show circumstances from which the court can find as a fact that the separation was without reasonable cause. The witnesses testifying in this case for the libellant and respondent simply testified that the respondent left her husband about the time alleged in the libel; that they did not know why she left her husband; that they had been in the habit of visiting the home of the parties to the suit, some several times a week and others not so frequent, about the time of the alleged desertion; that they did not observe that the respondent had any reason for leaving her husband, so far as they were able to discern. And the only statements that the husband and wife were not living harmoniously came from one or the other of the parties to the suit themselves, so that we are confined to the testimony of the libellant and respondent themselves as to their family troubles, there being little corroboration of the story of either sides except as they had detailed their respective complaints against each other to outsiders.

The respondent admits leaving the habitation of her husband in Washington county, taking with her nearly all the household goods to Cambria county, where she remained for more than two years. The bare statement of this fact without any explanation would lead us to the conclusion that the wife deserted the husband. But this admitted fact still casts the burden on the libellant in this case, who is seeking the divorce, to not only show this admitted separation, but the further essential under the act he is employing for relief, circumstances from which the court can find as a fact that the separation was without reasonable cause.

There was certainly a course of treatment

of the wife at the hands of her husband which, if believed by the court, fully justified her in withdrawing from the household of her husband and absenting herself until such a time as she could be reasonably satisfied that she could return with personal safety. Her testimony is to the effect that there was such a course of treatment accorded her by her husband while she remained with him that convinced her that it was necessary to get her husband back among his relatives on account of the peculiar turn of his temperament, and upon his refusal to go at her request she packed up the household goods and moved to Cambria county, where his relatives lived, in the hope and expectation that he would soon follow her. She further testifies that during the two years in which the libellant claims a desertion she wrote him frequent letters asking him to come to Cambria county, in which she stated she had not deserted him. The libellant before the commissioner admitted to receiving letters from his wife during the two years which he did not answer, but denied their contents as stated by the respondent. He was called upon twice in a formal way during the pendency of this proceeding to produce those letters and refused to do so, leaving the inference of fact to be drawn from the wife's statement and his conduct with regard to these letters to be as stated by the wife. And, further, it is not denied by the libellant that on two occasions after the separation she returned to his residence in Washington county and besought him to admit her, and on one of these occasions he forcibly ejected her from the house and refused to permit her to return.

Before she left him when she would be calling in the evening upon the neighbors she would come home and find herself locked out. On another occasion when he would leave for his work in the morning he would lock her in the room and she would have to call for the neighbors to unlock the door. On another occasion he brought a tub up from the cellar and set it in the middle of the floor, heated water in the wash-boiler and announced that he was going to put her in the tub of water and wash her, clothes and all. At times he struck her and choked her with his fist and hand, admitting himself that on

one occasion he took her by the neck to choke her. We have here enumerated only a few of the indignities to her person which the respondent testifies she was subject to prior to the time of her separating from him and that the separation was for these indignities, and that she took up her abode among his people with the belief that he might follow her there and she would be in a safer place for the reason his people would use corrective measures that would insure her safety, which she could not.

While no offspring was the result of this union the wife testifies that the relation existing between them from the time of their marriage was the same as usually follows such relation and explicitly denies the testimony of her husband who says that from the time they were married she refused to sustain the relation of a wife toward him and continued to do so up until the separation. If his statements in this particular, as he testifies, were true he would have another ground of divorce and should have pursued it, if he sought to get rid of the respondent, rather than subject her to a course of indignities that he now asks us to believe were simply such corrective measures or treatment as a husband could lawfully administer to his wife.

Under all the testimony in the case, with the meager corroboration of either of the parties, whether the admitted separation was without reasonable cause, we are unable to determine. We would certainly hold that no man should be forced to live with a woman who fell so far short of her marital duties as the libellant charges against the respondent, but before he can rid himself of a bargain so bad of his own making he must show legal grounds for the dissolution of that relation, and a poor way to do so is to begin a series of indignities to the wife so as to force her to withdraw from his house and home. Our conclusion of this whole matter is that the libellant has not shown such a case of wilful and malicious desertion and absence by the wife from his habitation without reasonable cause, nor has he shown such circumstances, the separation being admitted, from which the court can find as a fact that the separation was without reasonable cause.

There are a number of well considered lower court decisions on this point in our state which are worthy of notice. It is not enough to show by witnesses or by an admission that there was a separation lasting for two years or upwards and then leaving it to the court to infer that this separation was a wilful and malicious desertion. In *Williams v. Williams*, 1 Woodward 308, before Judge Woodward, on a petition for a divorce on the ground of desertion, the witnesses testified that they did not know of respondent having been with her husband during twelve years past, and that she had unjustly and maliciously deserted him. A decree was entered on this testimony and afterwards vacated on the ground that it was not sufficient for witnesses to testify that the respondent had wilfully and maliciously deserted the libellant, but that the facts must be proved to show such desertion, and that it was wilful and malicious. On this point and to this effect is *Jayne v. Jayne*, 4 Kulp 74, before Judge Rice; *Detrick v. Detrick*, 6 Kulp 164, before Judge Rice. In *Hassett v. Hassett*, 18 Pa. Co. Ct. Repts. 269, Judge Noyes there said, that the "proof to show desertion must be substantial and convincing, and must cover every fact necessary to make out the case; that it was not competent for witnesses to testify that the respondent deserted the libellant, but their testimony must be confined to the facts from which the inference of desertion is to be drawn; that the separation of the parties, even the absence of the respondent from the home, is not necessarily proof of wilful and malicious desertion but that there must be other facts evincive of an intention wilfully and maliciously to break off marital co-habitation permanently."

In the present case the evidence of the respondent's writing letters home to her husband in which she stated she desired him to come on and live with her in the vicinity of his people, as she desired him to do when she packed up their household goods and left, and the taking up of her abode in the vicinity of his people, the two visits to him, after the two years had elapsed, offering to return to him, is evidence negative of any inference of an intention wilfully and maliciously to break off marital

co-habitation permanently. It is true the admitted absence for a continuous period of two years is some evidence of desertion, but the burden does not shift in an application for a divorce on the ground of desertion as it would in a case where a husband or a wife had forfeited their courtesy or dower interest for desertion for one year or upwards immediately prior to the death of one or the other, as provided by the act of May 4, 1855, P. L. 430.

In an application for divorce on the ground of desertion the mere proof of separation for the statutory period by the libellant is not enough, he or she must go further and show circumstances from which the court can find as a fact that the separation was without reasonable cause. To deprive one of courtesy or dower for separation under an act of 1855, the showing of absence for a period of one year and upwards raises a presumption of wilful and malicious desertion according to the requirements of that act and casts the burden upon the respondent to show that he or she had reasonable and lawful cause. *Weller v. Weller*, 213 Pa. 265; *Bealor v. Hahn*, 117 Pa. 169; *Hahn v. Bealor*, 132 Pa. 242.

A deliberate and wilful neglect to provide is equivalent to a desertion under the words of the act of assembly, 1855, but to entitle one to divorce under the act of March 13, 1815, 6 Smith's Laws 286, as we have already said, a wilful and malicious desertion and absence from the habitation of the other without reasonable cause for and during the continuous period of two years must be shown and to prove this the burden is cast upon the one seeking divorce, not only to show a separation but to show circumstances from which the court can find as a fact that the separation was without reasonable cause.

A contest merely involving property rights is far different from an action in which an effort is made to disturb the social relation which is one of the very foundation stones of organized society. And when an effort is made to sever this relationship, it is the duty of the court to require the party seeking the divorce to fully sustain the action and to show all the surrounding facts and circumstances at or about the time of

the alleged desertion, so that the court can, from the facts and circumstances, determine whether or not the respondent was guilty of wilful and malicious desertion without reasonable cause. Although this rule may bear hard upon libellants in certain cases where they are debarred from the right to testify because the respondent cannot be served, this is not such a case. Both parties appeared and testified, with their witnesses. There is little corroboration of the testimony of either by the witnesses for the respective sides, and we therefore must rely mainly upon the testimony of the parties libellant and respondent. And under the rule of law we have laid down we hold that the libellant has not satisfied the court, or from circumstances from which we can find it as a fact, that the separation was without reasonable cause.

And now, June 28, 1907, upon a hearing of the whole case the libel is dismissed and the divorce applied for is refused at the cost of William B. Dearmin, the libellant.

For libellant, *Hughes & Hughes*,

For respondent, *Irwin, Wiley & Morgan*.

[From Harry Russell Myers, Esq., Washington, Pa.]

(Common Pleas, Washington County.)

### TOWNSHIP OF SOUTH STRABANE v. PATTERSON.

*Case stated—Act of April 12, 1905, P. L. 143—Road Taxes.*

A. tendered payment of his road taxes to the treasurer for the road supervisors for South Strabane township on the valuation as shown by the books for the year 1906, claiming that according to act of April 12, 1905, P. L. 143, the levy should be made on the first Monday of March, 1907. The levy was made May 4, 1907. The triennial assessment was the year 1907, and the county commissioners did not adjust the valuations in South Strabane township until May 1, 1907. That the last adjusted valuation preceding the first Monday of March, 1907, is the valuation for the year 1906, and that on May 4, 1907, the supervisors should not have been controlled by the mandate of the law to take the then last adjusted valuation.

Held, the tax should be levied and paid from the last adjusted valuation as made by the board of county commissioners sitting as a board of revision.

No. — August Term, 1907. Case stated. Question: Interpretation of the act of April 12, 1905, P. L. 143.

Opinion by McILVAINE, P. J. Filed June 26, 1907.

The Real Estate Trust Company on May 31, 1907, was the legally appointed treasurer of the board of supervisors of South Strabane township in Washington county and had in its hands on that day the tax duplicate for the tax year of 1907 for the purpose of receiving these taxpayers of the township whose names appeared thereon the taxes assessed against them for that year. The duplicate showed the name of the defendant, J. G. Patterson, and an assessment of four mills on his real estate situate in said township valued at \$662,965 and a tax due from him of \$2,652.86. He on that day tendered payment of the sum of \$2,003.88 in full discharge of the charge against him on said duplicate. The treasurer refused to receive this sum on this condition. Clearly this tender was *prima facie* insufficient, and it will be admitted that the burden of showing that he should be relieved from the payment of over \$600 of taxes assessed against him is upon him. How does he propose to do this? Let us see, taking the facts found in the nature of a special verdict as our guide.

The second section of the act of April 12, 1905, P. L. 143, provides "that the road supervisors of each township shall meet at the place where the auditors of the respective townships meet to perform their official duties on the first Monday of March, 1906, and yearly thereafter; and after having duly sworn \* \* shall organize \* \* and appoint one person as their treasurer who shall not be a member thereof; and shall proceed immediately to levy a road tax which shall not exceed ten mills on each dollar of valuation; this valuation shall be the last adjusted valuation for county purposes and which shall be furnished to said road supervisors by the county commissioners of the proper county."

On the first day of May, 1907, the adjusted valuation of 1907 of the defendant's real estate was placed in the hands of the supervisors by the county commissioners. On the fourth day of May, 1907, they made

the township levy of four mills, and on this valuation the tax against the defendant was computed. On its face this action of the supervisors appears to be regular. The defendant says no, that the computation of his tax should have been on "the adjusted valuation of 1906," notwithstanding the fact that on May 4th, when the levy was made, that valuation was not "the last adjusted valuation." He contends that the levy should have been made on the first Monday of March, 1907, and as at that date the valuation of 1906 was "the last adjusted valuation;" that on May 4th the supervisors should not have been controlled by the mandate of the law to take *the then* last adjusted valuation but that they should have gone back to the year 1906. This contention is ingenious, but will it bear examination? It is certainly not logical. If the supervisors could not legally make a levy on May 4th *because* the law required them to make it on the first Monday of March, then they could not use the valuation of 1906 any more than they could the valuation of 1907, and no taxes could be collected from the defendant for the year 1907. If the supervisors could legally levy a tax on May 4, 1907, there is certainly no law requiring them to make it on the adjusted valuation, *not the last*, but the one before the last. The defendant, therefore, is either liable for the amount of taxes demanded by the treasurer and shown by the duplicate or he is not liable for any. The act of assembly does not expressly nor impliedly provide that the levy when made after the first Monday of March shall be made on the last adjusted valuation *as of date the first Monday of March*, nor does it provide that the levy shall be made on the first Monday of March. The act provides that the board of supervisors after they have organized on the first Monday of March shall *proceed* immediately to levy a tax for the current year then commencing. This certainly does not require for the resolution fixing the levy to be adopted on that day. The board of supervisors might very properly proceed immediately to levy a tax on the first Monday of March and not come to an agreement as to the rate until the 4th of May following; and there is nothing in the case stated showing that the board of supervisors did not organize on the first Monday of March and on that day take up the question of the tax levy for the year and continue its considera-

tion from time to time until May 4, 1907, when the levy was made. The legislature in using the word *proceed* intended to give time for discussion and necessary delays. The act does not say that the board shall immediately consummate the levy, or make a levy, but they shall *proceed*—start on the way to make a levy. Clearly the language here used is directory and not mandatory and a levy made on May 4, 1907, is presumably legal, and there is no fact or facts set out in the case stated to show that it was illegal. But more than this, we think the defendant has misconceived the meaning of the words "the last adjusted valuation." *Adjustments* of the valuation of real estate by the county commissioners as a board of revision are made not every year but every three years, while *valuations* by the assessors are made annually, and their returns are the basis of the levies made by township supervisors *unless* and *until* changed by the commissioners. Valuations in many, many instances are not adjusted—they remain unchanged. We therefore hold that the proper construction of the words "the last adjusted valuation" means *the last valuation* returned by the assessor as he made it, or if there is an appeal from his valuation then the adjusted valuation made by the board of revision is to be taken and not that of the assessor. But the last valuation returned by the assessor for the current year (and not the valuation of some previous year) is the last valuation, and after being adjusted, if an appeal has been taken, is the last adjusted valuation, within the meaning of the words as used by the legislature. The board of supervisors on the first Monday of March, 1907, could call upon the county commissioners only for the last valuation returned by the assessor of the township, and it was the duty of the commissioners to give it to the supervisors adjusted if it needed adjustment. They could not substitute the valuation of some previous year which had been adjusted some previous year. They were bound to furnish what the law required them to furnish, and the supervisors were either bound to wait until the revisions were made or take the valuations made by the assessor and make the levy subject to correction when the revised valuation would come in.

And now, June 26, 1907, judgment entered in favor of the plaintiff and against the defendant for costs and the sum of \$2,652.

For plaintiff, *Hughes & Hughes*.

For defendant, *Boyd & E. E. Crumrine.*

[From Harry Russell Myers, Esq., Washington, Pa.]

AN interesting point has been decided by the New York Supreme Court, Appellate Division, First Department, in the case of *De Wolf v. Ford and Shaw*, proprietors of a hotel. An employee of the hotel forced his way into Mrs. De Wolf's apartment after midnight, when she was in her nightrobe, and in the presence of her brother and a third person, used toward her threatening and insulting language. Mrs. De Wolf sued for damages, but the appellate Division, speaking by Mr. Justice Ingraham and affirming the lower court, held that a hotel proprietor is not responsible in damages because a guest is insulted or his privacy invaded. The decision is based on *Calye's Case*, 8 Coke 32, decided about 1584, that is, three hundred and twenty years ago. In that case, which is reprinted in Smith's *Leading Cases*, it is held that the innkeeper's special liability is limited to movable property only, and does not extend to his person. Therefore, "if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his movables which he bringeth with him." Mr. Justice McLaughlin filed a strong dissenting opinion, which raises some nice questions as to the power of the common law to respond to changed conditions of society without the aid of legislation. "The law," he declares, "is a progressive science, and it has been the boast of the members of the legal profession that it not only keeps abreast but is ahead of the varying changes which are constantly being made for the comfort and improvement of human society. For this reason I do not think a rule applied three hundred years ago in determining whether an innkeeper was liable, considering the advancement that has since been made and the changes that have taken place in the mode of living, is decisive of the question. To hold that the proprietor of a hotel is liable if a ladies handbag be stolen from her room while she is a guest, but is not liable if one of his employes, by his direction, invades the privacy of her room against her protest when she is disrobed and in the act of retiring, and uses vile and insulting language to her, is to my mind abhorrent. It is but another way of asserting that the law is powerless to punish the greatest outrage. It is generally supposed when one, as a guest, is assigned to a room in a hotel that

this insures him the privacy of his home, as long as he pays the price charged for the room, conforms his conduct to the rules of house, and behaves himself properly. It is not true, as I understand the law, that the proprietor of a hotel or his servant has the right, without the consent of a guest, at any time to enter his room. This is not the law, and if it is it ought not to be, because it is against good morals and the general law of decency and whenever the proprietor of an inn, either himself or by his servants, commits such acts, he is liable in damages."

The general proposition that because the law considers an act, A, in violation of legal duty and so remediable by an action for damages, therefore the act B, which seems to contemporaneous notions more outrageous than A, must be likewise actionable, seems to lie at the basis of the reasoning of the dissenting opinion. This would place our common-law rights largely at the mercy of individual courts and judges. It would deprive them of all certainty and definiteness. A more conservative view was taken of an analogous question in *Robinson v. Rochester Folding Box Co.*, 171 N. Y. 538, where the court, denying to a young woman any remedy for the unauthorized use of her portrait by the defendant in advertisements, declared that the case was one which was proper for legislation—a suggestion which the legislature availed itself of in a short time. The "members of the legal profession" who boast that the law "not only keeps abreast but is ahead of the varying changes which are constantly being made for the comfort and improvement of human society," are, we fear, carried away by enthusiasm for their great science. How law, which can only represent, and somewhat imperfectly at best, the needs of society under actual conditions, and must develop through experiment and adaptation to unforeseen needs, can anticipate those needs, would surely puzzle any of the boasters. It is as if the laws of railroads should be developed before steam was applied to the movement of trains of cars, or a complete doctrine of trusts and monopolies should precede the actual evolution of industry through these agencies. Even Lord Coke, who considered the common law to be "the perfection of human reason," a sort of body of truth existing somewhere *in nubibus* to be drawn upon as exigencies should require, would have drawn back at such a proposition.—*Law Notes.*

# Pittsburgh Legal Journal

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No. 3.

PITTSBURGH, PA., JULY 31, 1907.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### McKINNEY et al. v. PENNSYLVANIA RAILROAD COMPANY.

#### *Railroads—Private grade crossings—Abandonment by owner—Injunction.*

In 1850 the defendant company purchased from plaintiffs' grandfather a portion of his farm in what is now the borough of North Braddock for the purpose of laying its railroad. In the following year the railroad was constructed and the grantor was permitted to keep open a private crossing at grade for access to his dwelling. In 1882 plaintiffs' father conveyed additional land to defendant, part of the consideration being the right to keep open and use a private wagon road across defendant's track, it being on the same location as the one originally allowed, and in pursuance thereof defendant built and maintained the crossing. In 1884 by proceedings in the Quarter Sessions Court a public road was laid out and opened on the lines of the original private right of way and across the railroad, pursuant to a petition of property owners, and among those petitioning appeared the name of plaintiffs' father, which was signed by his son, who sometimes did business for him and which was not repudiated by him. By these proceedings the road and crossing were made public. In 1903 the borough, by its proper authorities, contracted with the defendant to construct a road underneath its tracks for public use and in consideration thereof the road opened in 1884 was to be vacated. This was done, whereupon plaintiffs filed a bill to compel the defendant to replace and maintain the grade crossing. Held, that joining in the proceedings to make the private road and crossing a public one was an abandonment of the private right of way. Held, further, that the vacation of the public road by agreement between the borough and the railroad was an abandonment of the road and crossing and that thereupon defendant had a right to close it. Bill dismissed.

No. 922 March Term, 1907. In equity.

Opinion by CARNAHAN, J., specially presiding. Filed July 12, 1907.

The plaintiffs complain of the Pennsylvania Railroad Company that it has, without authority of law, closed a certain grade crossing in the borough of North Braddock. They claim right to it as a private crossing, and ask that the railroad company be compelled to replace and maintain it. From the bill, answer and evidence we find the following facts:

#### FINDINGS OF FACT.

1. The Pennsylvania Railroad Company, by deed from William McKinney and wife, bearing date of May 3, 1850, and of record in the office for the recording of deeds, etc., in and for the county of Allegheny, Pennsylvania, in deed book Vol. 91, page 127, acquired the right to construct, maintain and operate, forever, its line of railroad through certain lands of said McKinney, situate within the lines of what is now the borough of North Braddock, in the county of Allegheny aforesaid. By this deed a grant, in fee, was made of a strip of land four rods in width, and of such additional width as might be required in the construction and use of said road at deep cutting and embankments, one-half thereof on each side of the center line of said railroad, the grant extending in length through the said lands, according to the location by the railroad company. Over said strip of land the railroad was built, and is now maintained and operated. In said deed the grantors released the railroad company from all damages, by reason of the construction of its road, and agreed to erect and maintain fences on their property along the line of the railroad on both sides thereof.

2. Prior to said deed and prior to the construction of said railroad over said lands a roadway crossed the lands of McKinney and was located over the said strip of ground, so acquired by the railroad company. This was a private road laid out by William McKinney. In the deed of William McKinney and wife to the railroad company, dated May 3, 1850, no mention was made of this road.

3. When the railroad was built through this property, about 1851, this private road was kept open, with the consent of the railroad company, for the use of said William McKinney as a means of access to and egress



from his property, which consisted of several hundred acres of land. It connected with other roads on either side of said property. The Pennsylvania Railroad Company, about 1851, constructed a crossing at grade on the line of said private roadway over its line of track on the land so purchased from McKinney, and maintained said crossing, at its own expense, continuously from the time of said construction until the 7th day of November, 1906. This crossing has always been known as "The McKinney Crossing," and is some four or five hundred feet east of Bessemer station on the line of the Pennsylvania Railroad. From 1855 until November 7, 1906, this private road and crossing were continuously used and traveled over by the general public.

4. William McKinney died in July, 1860. All of his lands, in what is now North Braddock borough, were devised to his sons, John and Robert, and by will of his father and deed of partition Robert became the owner in fee of the lands adjoining the line of railroad on either side.

5. By deed dated June 12, 1882, and of record in the office for the recording of deeds, etc., of Allegheny county, in deed book Vol. 439, page 150, Robert McKinney and wife granted and conveyed in fee to the Pennsylvania Railroad Company a strip of land on the north side of the railroad, about one hundred feet in width, adjoining the land previously conveyed by William McKinney and wife by deed of May 3, 1850, and containing 5.336 acres, more or less. In this deed was the following language in reference to a wagon road and railroad crossing:

"Reserving unto the said Robert McKinney, his heirs and assigns, forever, the right to have, keep, open, use and enjoy a wagon road over and across the Pennsylvania Railroad and the premises hereby conveyed to be located and described as follows, viz: Beginning on the southerly line of said railroad company's premises at the place where said line is intersected by a road now located which extends from the township road (at the public school house) across the said railroad to said Robert McKinney's stone quarry; thence extending from said beginning north twenty-six degrees east, one hundred and forty feet to a point; thence north thirty-five degrees west one hundred feet to the northerly line of the premises hereby conveyed. The said road crossing hereby reserved

to be constructed by the said railroad company at their own expense at the grade of the said railroad as constructed."

6. By agreement in writing, between the Pennsylvania Railroad Company and Robert McKinney, dated June 12, 1882, a copy of which is printed with plaintiff's bill, and marked "exhibit A," the railroad company, in consideration of the aforesaid deed of Robert McKinney and wife, of even date therewith, and in view of the provision or reservation thereon, in reference to a wagon road and railroad crossing, covenanted and agreed to and with the said Robert McKinney "to construct a road of the width of fifteen feet, in a good and workmanlike manner, of proper materials, in the location and of the course designated by red dotted lines on the plan hereto attached and made part thereof;" and the said Robert McKinney thereby covenanted and agreed to accept the road so constructed and that such acceptance should "be a full and ample release of the said party of the first part, their successors and assigns, from all liability by reason of the building of the said road." The road therein referred to is the road and crossing mentioned and provided for in the deed of Robert McKinney and wife of June 12, 1882, and the road and crossing in use from the time the railroad was built through the said property. The lines are substantially the same.

7. Pursuant to the said agreement and in keeping with the aforesaid so-called reservation in the deed of Robert McKinney and wife of June 12, 1882, the Pennsylvania Railroad Company, at or about June, 1882, reconstructed said crossing at grade, and continued to maintain it as aforesaid until November 7, 1906.

8. In 1886, at No. 3 September Sessions, 1884, in the Court of Quarter Sessions of Allegheny county, a public road was laid out and opened on the location of the above mentioned road, wholly including said road within its lines, and including said railroad crossing at grade. The width of each crossing was fifteen feet, and while there was a slight difference in the angles, the center lines of the crossings practically coincided. The record of this court of quarter sessions shows that the petition of property owners

for this public road was filed September 27, 1884, and on said petition appear the names, "W. J. McKinney" and "Robert McKinney," as signers thereof. The record also shows that the Pennsylvania Railroad Company opposed the proceeding.

9. At the hearing, June 7, 1907, Harvey McKinney, one of the plaintiffs in this bill, a son of Robert McKinney and grandson of William McKinney, testified on cross examination that the name, "Robert McKinney," which appears on the petition to the Court of Quarter Sessions at No. 3 September Sessions, 1884, was in the handwriting of W. J. McKinney, who was a son of Robert McKinney, and who is now dead. The witness was asked this question, and he gave this answer: "Q. Did your brother do business for your father? A. Some, yes."

10. Robert McKinney, son of William McKinney, died July 14, 1887. He left surviving him, his wife, Catherine, and children, W. J. McKinney, Robert McKinney, Samuel McKinney, Catherine Anderson, Eleanor McKinney, Harvey McKinney and Sarah McKelvy. Robert, his son, died September 24, 1887, and W. J. McKinney died August 21, 1901. Neither was married and neither left a will. The others are the present owners of the Robert McKinney property in North Braddock and are the plaintiffs in this bill.

11. In November, 1903, the borough of North Braddock, by authority of an ordinance duly passed and approved, entered into a contract with the Pennsylvania Railroad Company, by which the company agreed to construct and forever maintain underneath its tracks a passageway for the use of the public, twenty-five feet wide and properly arched, the same to be located at Dooker's Hollow street in said borough. It also agreed to construct a sewer in said passageway, underneath said arch, to connect with a sewer then under construction by the borough, and also to grade a connecting street. All of these improvements were to be made for the use of the public and at the cost and expense of the railroad company. In consideration thereof, the borough of North Braddock agreed to vacate 352 feet of the public road or highway, laid

out by the Quarter Sessions Court at No. 3 September Sessions, 1884, including the grade crossing of said highway.

12. The Pennsylvania Railroad Company made the said improvements, with the exception of the street to be graded, at a cost of more than \$76,000 for the stone arch alone, and the road or underground passageway was thrown open to the public. The borough of North Braddock thereupon, on November 6, 1906, passed an ordinance vacating the aforesaid public road and grade crossing, as it had by contract agreed to do, and this ordinance was approved by the burgess November 7, 1906. On November 7, 1906, the railroad company closed the part of the road so vacated, tore up the planks at "The McKinney Crossing," which, in later days, has also been called the "Bessemer Grade Crossing," and so barricaded the approaches to the tracks as to prevent further use of the crossing. It has remained closed ever since, the company refusing to restore and reopen it. Neither Robert McKinney nor his heirs ever received damages.

13. When this crossing was first made there was but one railroad track. When it was closed there were four main tracks and one siding at the crossing.

14. About 174 passenger trains and 126 freight trains pass said crossing place daily, except Sunday, when the number of passing trains is less.

15. The crossing was a dangerous one, in the sense that any grade crossing of a railroad with four main tracks and 300 passing trains daily, is dangerous. It does not, however, appear from the evidence that this crossing was particularly dangerous to life or property, the number of accidents at it being small.

16. There is located on the lands of plaintiffs, north of the Pennsylvania Railroad and near to the crossing, closed as aforesaid, a plant for the manufacture of brick and a valuable stone quarry. The brick plant was for about seven years prior to November 7, 1906, and has been continuously since said date operated by Kellar & Milligan, under a lease from the plaintiffs, which provides for the payment of a royalty of 25 cents per thousand brick manufactured. Most of the brick manufactured there

was hauled in wagons over "The McKinney Crossing" to points on the south side of the railroad. The closing of the crossing has interfered with the delivery of brick, because, in order to reach the point at the south side of the crossing, it has been necessary to drive to the underground passageway or viaduct and return on the other side of the railroad. The distance from the crossing eastwardly to the viaduct is from 500 to 550 feet, measured on the line of railroad. The distance by wagon road is about the same; and the grade from the brick plant to the viaduct is a descending grade. Because of this increased distance, but principally because of the bad condition of the road between the plant and the viaduct, the delivery of brick has been decreased a little over one load of a thousand brick per day. The payment of royalty has not been affected.

17. Neither the borough of North Brad-dock nor any of its officials ever received any notice from the plaintiffs that they claimed a private right to "The McKinney Crossing," except that shortly before the passage of the vacation ordinance of November, 1906, and while it was pending, C. A. Anderson, husband of one of the plaintiffs, informed the president of council that his "wife's folks had a private right of way across there." The president replied that council had been so informed by the borough solicitor, and that it was not the intention "to do away with anything but the borough's rights in the matter." This conversation took place about the time the viaduct was completed.

18. Neither the Pennsylvania Railroad Company nor any of its officials ever received from any of the plaintiffs, during the building of the viaduct, or in fact, since the proceeding in the Court of Quarter Sessions at No. 3 September Sessions, 1884, any notice of a claim by them of a private right to "The McKinney Crossing;" nor did the railroad company give any notice to them of its contract with the borough and the purpose to close the crossing.

#### CONCLUSIONS OF LAW.

1. The original crossing of 1851 was consented to and made by the Pennsylvania Railroad Company for the use of William

McKinney. It was not a public crossing, nor did it become so by reason of the fact that the public actually used it from 1855 to 1886. There is no evidence of intent on the part of the railroad company to make it a public crossing. On the contrary, the evidence indicates that it was by the mere sufferance of the company that the public traveled over it. The railroad company, when it made its agreement of June 12, 1882, with Robert McKinney (exhibit A of plaintiffs' bill), did not treat it as a public crossing already established; nor did Robert McKinney when he made that agreement; nor did the public as represented by the signers of the petition to the Court of Quarter Sessions at No. 3 September Sessions, 1884; nor did the railroad company, when it opposed the said proceeding in the Court of Quarter Sessions, the very purpose of which proceeding was to make it a public crossing; nor did the court itself in said proceeding.

2. By the agreement of June 12, 1882, (exhibit A of plaintiffs' bill) in connection with the deed of June 12, 1882, from Robert McKinney and wife to the Pennsylvania Railroad Company, and the construction and continued maintenance of said crossing by the Pennsylvania Railroad Company, pursuant thereto, Robert McKinney, for himself, (whether also for his heirs and assigns, is questionable) did acquire a private right to said road and crossing.

3. By the proceeding at No. 3 September Sessions, 1884, in the Court of Quarter Sessions of Allegheny county, whereby said road and crossing became properly a public road and crossing, Robert McKinney did not lose his private right thereto, unless by some act of his in connection with said court proceeding, he estopped himself from thereafter asserting such right.

4. The signing of Robert McKinney's name to the petition to the Court of Quarter Sessions at No. 3 September Sessions, 1884, by a son who did "some" business for him, cannot but be treated as the act of Robert McKinney himself, in view of the facts that the court so considered it, that the said road and crossing became a public road and crossing in virtue of said court proceeding, which was based on said petition, that Rob-

ert McKinney himself never repudiated it, although he lived more than six months after the order of the court making the road and crossing public property; that no one since, until the hearing in this case, has ever questioned it, and that Harvey McKinney, his son, who now testifies, simply says that the handwriting is not that of his father but of W. J. McKinney, who did "some" business for his father.

We are of opinion that the signing of Robert McKinney's name to said petition was acquiesced in by and should be treated as the act of Robert McKinney.

5. By participating in an act, the purpose and effect of which was to increase the burden of the railroad company by forcing upon it the responsibility of a public crossing at grade instead of a mere private crossing at grade, Robert McKinney renounced and abandoned his private easement in said road and crossing and the same was thereby extinguished. There is no question of damages or compensation.

6. The Pennsylvania Railroad Company in making its contract with the borough of North Braddock for the building of the viaduct and the vacation of the public road and crossing had good reason to rely upon the proceeding in the Court of Quarter Sessions at No. 3 September Sessions, 1884, as evidence of Robert McKinney's abandonment of his private easement in said road and crossing; and the heirs of Robert McKinney should not at this late day be heard to deny it.

7. The vacation of the public road and Bessemer grade crossing by the borough of North Braddock by ordinance of November 6, 1906, approved by the burgess November 7, 1906, was an abandonment of the road and crossing by the proper public authorities, and there being no private easement therein, the railroad company was within its rights when it closed the same as it did.

8. The bill should be dismissed at the costs of the plaintiffs, and a decree should be drawn accordingly.

For plaintiffs, *John Rebman, Jr., and Rogers, Blakeley & Calvert.*

For defendant, *Patterson, Sterrett & Acheson.*

## Court of Common Pleas,

WASHINGTON COUNTY.

### VAN PELT v. VANDERSLICE.

*Ejectment—Paper title—Adverse possession—Question for jury.*

No. 135 May Term, 1905. Motion for judgment for defendant *non obstante veredicto*. Opinion by TAYLOR, J. Filed April 15, 1907.

This is an action of ejectment brought by the plaintiff against the defendant in possession of lot No. 143 in De Hass' plan of lots in West Columbia, in block No. 37 of said plan, containing four lots, Nos. 143, 144, 145 and 146; the said block of lots front on Third street on the east, Scott alley on the west, Walnut street on the south and Brown alley on the north; each of the four lots in said block are 60 by 200 feet. The common source of title is the said Charles De Hass. On April 10, 1815, the said Charles De Hass conveyed to one, Joseph Budd, lot No. 143, which deed of conveyance was recorded July 5, 1815, in the recorder's office in deed book No. 1, Z page 288. There is no evidence in the case that the said Joseph Budd ever entered into possession. In 1826 the husband of Hannah Budd, at No. 39 September Term of said year, petitioned the Orphans' Court of Washington county that a partition of the real estate of which the said Joseph Budd died seized some time since, consisting of two separate tracts of land, containing 103 and 113 acres respectively. No mention or reference to said lot No. 143, in suit, is made in said petition, and from the date of the deed to said Joseph Budd for said lot from Hass in 1815 to the date of the deed of Hester Winnett, who was a daughter of Joseph Budd, April 5, 1901, to Charles F. Reed, for said lot No. 143, in suit, and by deed from said Reed and wife to George Vanderslice, the defendant in this suit, is there any evidence in the case that any of the heirs of the said Joseph Budd, in whom Hass put the paper title to said lot No. 143 in the year 1815, ever was in possession of said lot, or anyone into or from them, or claimed to own it or any interest in it or

exercised any act of ownership over it, though the said Hester Winnett, a daughter, is shown to have lived all the intervening years and still resides in an adjoining township to said lot. Under this deed to this lot from Reed and wife in 1901 the defendant went immediately into possession of the same and erected a small store-room building thereon; the plaintiff, Van Pelt, who had acquired a title to same lot through and by quit-claim deed from one, W. G. Huggins, dated July 29, 1901, finding Vanderslice in possession went upon the premises with a force of men and forcibly removed Vanderslice's store building from it and took possession, which resulted in Vanderslice instituting an action of trespass against Van Pelt and his men, and a verdict, after trial, in favor of Vanderslice for damages to his building, etc., which judgment was affirmed by the Superior Court at No. 67 April Term, 1904, of said court.

On April 1, 1905, the present action of ejectment was begun by the said Van Pelt against the said Vanderslice in possession to recover possession and title to said lot of ground No. 143, averring that the same was in him and not in the said Vanderslice.

The paper title relied upon by the plaintiff at the trial consisted of the quit-claim deed, recorded, of W. G. Huggins to the said G. A. Van Pelt of date July 29, 1901, already referred to, and conveyed all the right, title, interest, property, claim and demand in, to and out of all those three (3) certain lots of ground situate in the town of West Columbia, etc., \* \* \* numbered 143 to 145 and 146 in Charles De Hass' plan, etc., \* \* \* being three of the lots in said block No. 37, including the lot in dispute, with a recital in said deed that "the lots hereinbefore conveyed having been held in peaceable and undisturbed possession by the said party of the first part (Huggins) for a period of more than fifty years, as per affidavit hereto attached, marked exhibit 'A,' and which is made a part hereof." On the same date of the quit-claim deed last above referred to, the said W. G. Huggins conveyed by deed of general warranty to said G. A. Van Pelt lot No. 144 in said block 37 of De Hass' plan, which is bounded on the north by lot No. 143 in dispute, and a re-

cital in said deed for lot No. 144 is "the lot hereinbefore conveyed, being the same which Charles De Hass et ux. by their deed dated the 9th day of September, A. D. 1815, and recorded in the office for recording deeds, etc., in and for said county of Washington in deed book — page — granted and conveyed to L. Huggins, and the said L. Huggins, deceased, on or about the — day of —, A. D. 1829, leaving to survive him as his only heir at law, W. G. Huggins, the party of the first part hereto." The evidence is that L. Huggins was the father of the said W. G. Huggins, who went into possession of lot No. 144, upon which was erected a dwelling house, and resided there with his family until his death in 1829, when said W. G. Huggins was a small boy, who moved shortly after the death of his father, with his widowed mother, to Ohio, where they lived for some years, and finally, after the death of his mother and when Huggins was a young man, moved back to Allen township in Washington county along the Monongahela river, not far from these four lots in West Columbia, which he deeded to the plaintiff in this suit, and claimed and took possession of, through tenants of his, to whom he had from time to time leased the same, received rent therefor and paid taxes assessed thereon.

It is conceded by the defendant in this action that W. G. Huggins did inherit lot No. 144, on which the house was erected, and that De Hass deeded the same to his father, Lawrence Huggins, but they deny that W. G. Huggins ever acquired title to lot No. 143 which adjoined the Huggins lot, No. 144, on the south. W. G. Huggins, the predecessor in title, as set forth in deed of the plaintiff for lots Nos. 143-5-6, claims to have acquired title thereto by adverse possession for more than fifty years; that while lot No. 144 came to him by descent from his father, as conceded by defendants, no one for that period was claiming to be the owner or was in possession of lots Nos. 143-5-6 but himself, and that the four lots were all in one enclosure surrounded by a fence with but the one building or dwelling on lot No. 144, and by the notorious, open, hostile, continuous and visible possession of the entire block No. 37 for much longer

than the statutory period he acquired such title as defeats the paper title interest derived by Vanderslice through an heir of Joseph Budd, to whom De Hass had deeded the lot No. 143 in 1815.

We are not attempting to refer here to the evidence introduced at the trial by the plaintiff of the acts and declarations, or other evidence in support of Huggin's title to the lot in dispute; in referring as we have to these deeds and claims of the respective parties it has been for the purpose of setting out and defining the issue as tried for review. To the lot in dispute plaintiff claims by deed from Huggins, who claims title to the disputed lot 143 by adverse possession. To said lot 143 defendant claims title by deed through Reed and wife, who obtained it by deed from Hester Winnett, who was a daughter of Joseph Budd, deceased, to whom De Hass had conveyed it in 1815. It is a case of title claimed by adverse possession on the part of the plaintiff and by paper title on part of defendant. The verdict of the jury was for the plaintiff and was the upholding of the title in Huggins by adverse possession, as set up by plaintiff alone. There is no exception taken to the law given the jury by the court on the question of title by adverse possession what essentials they must find by clear proof from the evidence and their co-existence. But we are asked to say that on the whole record the plaintiff could not recover, and the main reason advanced in support of this motion, when the case was argued and also argued to the jury, is, that W. G. Huggins never claimed to own lot No. 143, the one in dispute; and while this witness, who was very old and senile, did get somewhat confused on the witness stand at the trial of the trespass case and died before the ejectment was tried and portions of his testimony by consent were read in the latter trial from the stenographer's notes as printed out, and perhaps did make such an answer to a question asked him by counsel upon cross-examination, we have him detailing the circumstances concerning all these lots, and the fact that he conveyed all three of the ones he claimed to own by adverse possession, Nos. 143-5-6, to the plaintiff, Van Pelt, in 1901, reciting in his deed that he

held them by peaceable, undisturbed possession for more than fifty years, a fact, or item of evidence which counsel for defense may have overlooked when he laid so much stress upon one part of Huggin's testimony, claiming that Huggins himself never claimed to own lot No. 143.

The issue was so clearly defined and clean cut in the arguments of counsel to the jury and we tried in our charge not to obscure it as they made it, that the fact that no one denied W. G. Huggins owned lot No. 144, the jury must not be misled by the evidence of acts of his tenants while living in the house on lot 144, not authorized by Huggins, or claimed by him or them as showing any title to other lots than No. 144. The case was a clear one of fact for the jury on the question of title by adverse possession.

And now, April 15, 1907, the motion for judgment for the defendant *non obstante veredicto* came on to be heard on the record of the whole case and was argued by counsel, whereupon, upon due consideration, the motion is dismissed and judgment ordered to be entered for the plaintiff on the verdict of the jury on payment of the jury fee.

For plaintiff, *T. F. Birch.*

For defendant, *Irwin, Wiley & Morgan.*

[From Harry Russell Myers, Esq., Washington, Pa.]

(Common Pleas, Washington County.)

## COMMONWEALTH ex rel. UNDERWOOD v. VERNON.

*Act of March 5, 1906, P. L. 78—Elections—Quo warranto—Councilmen.*

A was duly elected a councilman of the borough of Deemston, but failed to file his expense account under act of March 5, 1906, P. L. 78, but was sworn in as a councilman and took his seat, he having filed in the office of the Court of Quarter Sessions his written oath, thinking he had complied with the requirements of the act of assembly. Forty-six days after the February election he filed with the clerk of the Quarter Sessions Court an amended written oath, in proper form, setting forth that his election expenses did not exceed fifty dollars, and again took the oath of office and acted as councilman. On quo warranto proceedings brought against him to oust him from office; judgment in favor of the defendant.

No. 4 August Term, 1907. Quo warranto.

Opinion by McILVAINE, P. J. Filed June 28, 1907.

#### FACTS FOUND.

1. G. N. Vernon at the last February election in the borough of Deemston in this county was elected a member of the council of that borough and at the first meeting of the new council of the borough in March, 1907, after having taken the required oath was installed into the office and since that time to the present has continued to act as a member of the council of said borough.

2. On the 4th day of March, 1907, the said G. N. Vernon took his oath before J. B. Barnard, burgess of said borough, that his aggregate receipts and disbursements in connection with his nomination and election to said office on the 19th of February, 1907, did not exceed fifty dollars; said oath was reduced to writing and the jurat was signed by the said J. B. Barnard, but the said G. N. Vernon by mistake failed to sign his name thereto; said written oath was on the 4th day of March, 1907, filed in the office of the clerk of the Court of Quarter Sessions by the said G. N. Vernon then under the belief that he was fully complying with the requirements of the act of assembly approved March 5, 1906, and in pursuance of that belief he was afterwards, on the said March 4, 1907, sworn and installed into the office of councilman as above set out.

3. The defect in his written oath being called to his attention, G. N. Vernon on the 6th day of April, 1907, (46 days after the February election) filed in the clerk's office an amended written oath in proper form setting forth that his election expenses did not exceed fifty dollars and at the next meeting of the borough council he again took the oath of office and has continued since then to act as councilman.

4. No one is claiming his seat, but the district attorney as deputy attorney general has suggested that under these facts and the provisions of the act of March 5, 1906, *supra*, he is illegally and without authority of law holding said office.

#### CONCLUSIONS OF LAW.

Generally speaking, we must presume that the legislature did not pass the act of 1906 or intend it to be so interpreted as to thwart the will of the people. No complaint is found in the district attorney's information that G. N. Vernon was not honestly elected

to the office of councilman or that he knowingly did anything or failed to do anything that vitiated his title to office. So far as the conscience of Mr. Vernon was concerned, it was void of offence. He unintentionally omitted to sign his name to the written oath which he had verbally taken and when he discovered his mistake he corrected it, and this, as we hold, complied with the spirit if not the letter of the law.

To hold under the circumstances of this case that G. N. Vernon was never legally inducted into office or that he should be now evicted from an office which he holds and which no one else claims, would certainly not only unjustly thwart the will of the people honestly expressed but would be doing a wrong to G. N. Vernon. Even granting that the act of 1906 wherein it requires the oath as to election expenses to be filed with the clerk of the court within thirty days after the day of the election, is mandatory, we can find that in this case it was so filed because we must now look at it as amended and that amendment will be granted as made *nunc pro tunc*. But we do not believe that the direction of the act to file the oath within 30 days is mandatory, it is only directory; and if the man whom the people elected is in office and his election is conceded to be honest and he has complied with the requirements of the act of 1906 (in everything except that he has been tardy in his compliance) and no one is claiming his office, the court will not on quo warranto issued at the suggestion of the district attorney evict such a man from office. In a proceeding like this, possession alone—the defendant being a *de facto* officer—is a good defence against a suggestion of the district attorney that contains no allegation of violations of law other than those that are technical and which were unintentional and wronged neither the commonwealth nor any of its citizens.

To illustrate: A person elected school director in Beallsville borough at the February election omits to file a return of his election expenses and on the first Monday of June, 1907, presents himself at the meeting of the board for organization, the board organized without him and refused to recognize him because he has not complied with the act of 1906 and so tell him. He immediately goes to the office of the clerk of court and for the first time files his account in the form required by law and returns to the board meeting after it is organized and

asks to be seated as a member thereof and they refuse to recognize him. Under such circumstances the court would not perhaps grant him relief against his own default and compel the board to seat him as one of its members; but suppose the board should seat him after he has complied with the act of 1906 and after he had been seated and became an officer de facto, the court in quo warranto proceedings at the suggestion of the district attorney was asked to turn him out of the office, it would not do so. In both instances it would leave the parties as it found them. The act of 1906 provides, how any violations of its various enactments shall be inquired into and how it shall be enforced, and the act must be violated where the purpose is to enforce it, and in quo warranto proceedings the court will not invade the province of the act of 1906 but will confine its inquiry to the one question before it, that is, 'shall the defendant be ousted from office?' And confining ourselves solely to this question, we believe it would be unjust both to the defendant and a majority of the voters of Deemston borough to deprive him of the office of councilman which he now holds and to which he was elected.

And now, June 28, 1907, judgment is entered in favor of the defendant for costs.

For plaintiff, *McIlvaine & Clark*.

For defendant, *T. F. Birch*.

[From Harry Russell Myers, Esq., Washington, Pa.]

## Court of Common Pleas,

MERCER COUNTY.

### COMMONWEALTH v. REEHER.

*Justice of the peace—Certiorari—Criminal law.  
Jurisdiction of—Assault and battery.*

Where a defendant who had been arrested for assault and battery, insisted on having his case heard and determined by a justice of the peace, and a hearing was had, against the protest of counsel for the commonwealth, which resulted in a conviction and the imposition by the justice of a fine and costs, both of which were at once voluntarily paid by the defendant. Held, that such proceedings will not be reversed and the money refunded, on certiorari.

No. 39 October Term, 1906. Certiorari to a justice of the peace.

Opinion by WILLIAMS, P. J. Filed March 18, 1907.

On July 24, 1906, an information was

made before a justice of the peace charging the defendant with the offence of assault and battery. A hearing was had on July 27, 1906, when the justice, after hearing the witnesses for the commonwealth, at the request of counsel for the defendant and against the protest of council for the commonwealth, also heard the testimony of the witnesses for the defendant.

Having heard the testimony on both sides, the justice assessed the defendant with a fine of \$5 and costs, which were at once paid by the defendant, who was then discharged.

On August 2, 1906, the defendant again appeared at the office of the justice, and gave notice of an appeal. On August 16, 1906, a writ of certiorari was issued by the prothonotary, which was served on the justice by counsel for the defendant on August 17, 1906, said writ being returnable September 4, 1906.

The specifications of error, five in number attack the jurisdiction of the justice to either try the defendant or to impose a fine or costs on him, even though the defendant consented to his jurisdiction.

On October 15, 1906, counsel for the commonwealth moved to quash the certiorari on the ground that the defendant voluntarily paid the fine and costs immediately after they were imposed upon him by the justice, thus wholly ending and determining the case. The rule granted on said motion is now the question before the court.

It is conceded by all concerned that justices of the peace have no jurisdiction to dispose of a case of assault and battery by summary conviction, as was done in this case, but that their jurisdiction to impose a fine and costs in such cases is limited to those in which the defendant has either entered a plea of guilty or has been adjudged guilty on a trial by a jury of six, under the act of May 1, 1861, P. L. 682, extended to Mercer county by the act of March 30, 1864, P. L. 134.

The question here, however, is the right of a defendant, after having insisted on having his case heard and determined by the justice, and after having voluntarily paid the fine and costs imposed upon him, to have the proceedings reversed on certiorari.

In *Com. v. Gipner*, 118 Pa. 379, the defendant was convicted before a magistrate, of a violation of the act of April 22, 1794, commonly called the "Sunday law," and immediately after his conviction, without



waiting for the issuing of any writ, and without threat or request from the magistrate or any other person, paid the fine and costs. Three days later he obtained a writ of certiorari and removed the record of his conviction into the common pleas for a review of alleged irregularities in the record of the magistrate. The court reversed the judgment of the magistrate and ordered restitution of the fine and costs.

On writ of error, the Supreme Court held the record sufficient to sustain the conviction and reversed the court below. The opinion of the Supreme Court was delivered by Mr. Justice Williams, in which he said:

"The record of conviction is in substantial conformity to the requirements of the act of 1794, and should have been held to be sufficient in form and substance \* \* \* But if it had been otherwise, the case was at an end before the certiorari issued, by the voluntary payment and satisfaction of the fine and costs; and the common pleas had no authority in the premises."

In *Com. v. Shofnoski*, 5 Dist. Rep. 784, the defendant was charged with a violation of a borough ordinance, and at the trial before the justice the witnesses for the defendant were not permitted to testify. A judgment of conviction was entered against the defendant, and a fine and costs imposed upon him, which he paid.

On certiorari, the entry of judgment without hearing defendant's witnesses was held to be error, and was reversed. Judge Doty, of the common pleas of Westmoreland county in his opinion, said: "We have no power, however, to order restitution. The defendant voluntarily paid the fine and costs. \* \* \* The certiorari was not issued until after the case was at an end by payment and satisfaction of fine and costs." Citing *Com. v. Gipner*, *supra*.

It is true that these cases were both within the jurisdiction of the justice, but no stress seems to have been put on that fact in the opinion of the court in either case. And while Judge Doty reversed the judgment in the case last cited without restitution, for the reason that the defendant had been denied the right to have his witnesses heard, Mr. Justice Williams in the former held that even although the record was defective, the case was at an end before the certiorari issued.

The defendant here was not deprived of

any rights by the justice, and while we do not hold that the defendant could by any act of his, clothe the justice with jurisdiction to hear and determine the charge against him by way of summary conviction, we think his voluntary payment of the fine and costs imposed upon him put an end to the case, and that the certiorari subsequently issued was of no avail.

We do not consider the case of *Mills v. Com.*, 13 Pa. 627, cited by the learned counsel for the defendant, in point here. In that case the defendant was tried and convicted at an adjourned session of the court of quarter sessions that was without jurisdiction to try any case requiring the intervention of a jury, and it was held that the consent of defendant's counsel, or even of the defendant himself, could not give jurisdiction. Had the conviction in that case, however, been followed by a sentence, imposing a fine and costs on the defendant, and which he voluntarily paid, we do not apprehend that there would have been a reversal of the judgment on the certiorari subsequently issued.

We are, therefore, of the opinion that the contention of the learned counsel for the defendant is without substantial merit, and that the rule should be discharged. If, however, the consideration of the cases referred to had left our mind in doubt as to our duty in the premises, we would be compelled to discharge the rule for the reason that the writ of certiorari was issued without a special allocatur first obtained from the court. This we think is a fatal defect. *Com. v. Antone*, 22 Super. Ct. 412; *Com. v. Mitchell*, 20 Montg. 49; *Rubel v. Paint Borough*, 14 Dist. Rep. 117.

It is true that no exception has been filed to this omission, but, as was said by Judge Audenried in *Com. v. Antone*, *supra*, "The court may of its motion, on this defect appearing at the hearing of the exception, quash or dismiss the writ." It is probable that in a case presenting substantial merit and defects which the court should correct, in order that substantial justice may be done, the court could award a special allocatur, *nunc pro tunc*. It is sufficient to say, however, that the record here does not present such a case. The rule should, therefore, be discharged and the writ quashed.

For commonwealth, *James M. Hittle*.

For defendant, *J. J. Donaldson*.

[From James D. Emery, Esq., Mercer, Pa.]

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No. 4.

PITTSBURGH, PA., AUGUST 7, 1907.

## Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

### ANDERSON et al. v. DEMPSTER.

*Equity—Exchange of property—Reconveyance.*

In a bill filed to cancel certain deeds and a mortgage evidencing an exchange of property, the plaintiff failed to show satisfactorily any fraud, accident or mistake, and also failed to show any offer to re-convey the property or that defendant could be placed in the same position as prior to the transaction. Held, that the bill should be dismissed.

No. 565 September Term, 1906. In equity.

Opinion by CARNAHAN, J., specially presiding. Filed June 29, 1907.

The parties in this proceeding agreed to exchange certain pieces of real estate. Deeds were executed and also a bond and mortgage, all of which are of record in the recorder's office of Allegheny county. The plaintiffs aver that the title to certain property in the city of Pittsburgh was in the names of William F. Anderson and Margaret V. Daub, but that William Anderson, the father of William F. Anderson and Margaret V. Daub, was the real owner of the same; that William Anderson, during the month of August, 1905, in company with the "defendant or his accredited agent," visited certain property in Allegheny City, with a view of exchanging his property in Pittsburgh therefor, and that while on the ground it was represented to him by the "defendant or his accredited agent" that "said property fronted on Woods Run avenue, for all or nearly all of its length;" that he agreed with defendant to exchange his property in Pittsburgh for the said property in Allegheny City upon a basis of \$12,000 for the

Pittsburgh property and \$15,000 for the Allegheny City property, he to give a purchase money mortgage of \$3,000 on the Allegheny City property. That on September 1, 1905, he and the defendant met at the office of James A. Wakefield, Esq., attorney at law, Pittsburgh, for the purpose of passing their deeds and delivering the bond and mortgage, but that at said meeting he discovered, from the description in the deed of defendant to him, that the property in Allegheny City did not have the frontage on Woods Run Avenue that had been represented to him; that he thereupon called the attention of defendant to this discrepancy, and it was then and there agreed by him and defendant that the papers be left with Mr. Wakefield, attorney for defendant, until their differences could be adjusted; that the papers were then left with Mr. Wakefield, with the understanding that he was to retain them until the parties should adjust their differences.

The plaintiffs aver that a deed from Samuel Dempster to William Anderson for the property in Allegheny City, and the mortgage from Anderson to Dempster, were duly signed and acknowledged when left with Wakefield, but that the amount of consideration in the deed, and the amount of debt to be secured by the mortgage, were not filled in, the understanding being that these amounts were to be ascertained by calculation, and afterwards, when agreed upon by both parties, were to be inserted in the respective papers. Plaintiffs aver that they were afterwards inserted by James A. Wakefield, or by his direction, without the knowledge or consent of Anderson, and that the deed and mortgage were recorded by Wakefield without the knowledge or consent of Anderson.

The plaintiffs pray for a decree directing that the deed from Anderson et al. to Dempster be revoked and the property reconveyed; that the bond and mortgage from Anderson to Dempster be cancelled and the mortgage marked satisfied of record, and that all of the parties be placed as they stood, respectively, with reference to their properties prior to the transaction complained of.

In the answer, specific denial of many of the material allegations of the bill is made.

It is denied that Anderson visited the property in Allegheny City in company with "defendant or his accredited agent;" it is denied that defendant or any person with his authority represented to Anderson that the property "fronted on Woods Run avenue for all or nearly all its length." It is denied that the papers were left with James A. Wakefield or that he had anything to do with the filling in of blanks or the recording of the deed of Dempster to Anderson. On the contrary, it is averred by defendant that by writing, dated August 1, 1905, he agreed with William Anderson to exchange said properties, the defendant to assume a mortgage of \$7,500 and \$400, more or less, accrued interest and taxes against the Pittsburgh property, and the plaintiff, William Anderson, to give a bond and mortgage for \$2,500, plus \$400, more or less, accrued interest and taxes, as above stated, the mortgage to cover only a part of the property in Allegheny City. That at the time of the said agreement defendant did not have title to the Allegheny property, but negotiations were then pending for the acquisition of it by him, and it was provided in the agreement, a copy of which is printed with the answer, that should he not acquire such title the agreement was to become null and void. That he did acquire title to said property shortly afterwards, and that when the agreement was signed, and throughout the transaction, there was exhibited to William Anderson a survey prepared by Lippincott & McNeil showing the Allegheny property by metes and bounds, from which he had a plan of lots laid out. That at the meeting in September, which meeting was on the 8th of September, 1905, (not September 1st), the exact amount owing on the Pittsburgh property had not, and could not, then be ascertained, and the parties were, therefore, unable to fix the amount to be inserted in the bond and mortgage. That the deed from Dempster for the Allegheny City property was signed and acknowledged and the bond and mortgage of William Anderson to Dempster, having also been signed and acknowledged, were then left with John A. Sharpe, who had theretofore been acting as an agent or representative of Anderson, Sharpe to ascertain the exact amount of in-

terest and taxes due on the Pittsburgh property, to submit the same to Anderson and defendant, and upon their approval to insert the proper amount in the bond and mortgage. The amount of consideration in the deed had already been written in it. That subsequently, Sharpe, having found the amount of interest and taxes to be slightly in excess of \$600, submitted the same to William Anderson and the defendant, and with the approval of each inserted the amount of \$3,100 in the mortgage as the mortgage debt, being the sum of \$2,500 theretofore agreed upon, with \$600 added thereto. It is averred by defendant that Sharpe, at the instance of William Anderson, had the deed from Dempster to Anderson recorded; and the averment of plaintiffs that at this September meeting at the office of James A. Wakefield, William Anderson objected to the description of the property, is denied.

It is further averred by defendant that as a part of the transaction he assumed the payment of a mortgage of \$7,500 against the Pittsburgh property, since which time he has paid on account of principal \$3,400, together with all accrued interest.

The cause was heard on bill and answer.

#### FINDINGS OF FACT.

1. William Anderson, for himself and representing the other plaintiffs as the owners of six certain lots of ground fronting on Southern avenue, in the city of Pittsburgh, and nine certain lots of ground fronting on Griffin street, in the city of Pittsburgh, made an agreement in writing with Samuel Dempster, the defendant, by which Dempster agreed to convey to the plaintiffs, by deed in fee simple, some four acres of land, more or less, situate in the Fifteenth ward of the city of Allegheny, in consideration of which the plaintiffs were to deed, in fee, to Dempster all of the above mentioned lots, situate in the Thirty-second ward of the city of Pittsburgh. As a part of the agreement, Dempster was to assume the payment of a mortgage of \$7,500 against the Pittsburgh property "and \$400, more or less," accrued interest and taxes against the same. Anderson was to give a bond and mortgage on the Allegheny City property for \$2,500, plus "\$400, more or less," amount of accrued in-

terest and taxes above stated. This agreement bears date of August 1, 1905, and a copy of it marked "exhibit B" is printed with the answer and made part thereof.

2. On September 8, 1905, William Anderson and Samuel Dempster met at the office of James A. Wakefield, Esq., for the purpose of exchanging deeds, delivering the bond and mortgage and closing the transaction. That at said meeting the deed from plaintiffs to Dempster for the Pittsburgh property, duly signed and acknowledged, was produced ("exhibit A" in plaintiffs' bill); the deed from Samuel Dempster to William Anderson for the Allegheny City property ("exhibit B" in plaintiffs' bill) was, at that time, duly signed and acknowledged and the amount of consideration was written therein; the bond and mortgage ("exhibit C" in plaintiffs' bill) of William Anderson to Samuel Dempster, duly signed and acknowledged, were produced, but the amount of mortgage debt was not filled in because the parties had not ascertained the exact amount of accrued interest and taxes which was to be added to the mortgage debt of \$2,500 previously agreed upon. By agreement of both parties at this meeting the bond and mortgage and the deed of Dempster to Anderson were left with John A. Sharpe, who had been acting as the agent or representative of William Anderson. Sharpe was to ascertain the exact amount of accrued interest and taxes, submit it to William Anderson and the defendant, and upon the approval of both to insert the proper amounts in the bond and mortgage. The deed of plaintiffs to Dempster was left with Wakefield.

3. Subsequently John A. Sharpe ascertained that the amount of accrued interest and taxes was slightly in excess of \$600. He submitted this amount to William Anderson and to Samuel Dempster and received the approval of each. He thereupon inserted the sum of \$3,100 in the mortgage, as the mortgage debt, and the bond was filled in accordingly.

4. John A. Sharpe, at the instance of William Anderson, had the deed of Dempster to Anderson recorded. The defendant, or his attorney, had the other deed and the mortgage recorded; the bond and mortgage,

after the filling in of blanks as aforesaid; having been delivered by Sharpe to defendant.

5. The defendant, having as a part of the transaction assumed payment of the \$7,500 mortgage against the Pittsburgh property, has paid \$3,400 of principal thereof and also accrued interest thereon.

6. The plaintiffs have made no offer to reconvey the property deeded by Samuel Dempster to William Anderson, nor do they aver in their bill that any part of said property is still in their possession or under their control.

7. The plaintiffs have made no offer to reimburse the defendant the amount of money paid by him on account of principal and interest of said \$7,500 mortgage.

#### CONCLUSIONS OF LAW.

In view of the foregoing findings of fact, it is apparent that the bill of plaintiffs cannot be sustained. It does not appear that there is any reason for the interference of a court of equity; nor does it appear, even if there were merit in the plaintiffs' case, that the parties could be placed as they were prior to the transaction complained of.

The bill should therefore be dismissed at the plaintiffs' costs.

For plaintiffs, *C. C. Lee* and *A. M. Lee*.

For defendant, *Patterson, Sterrett & Acheson*.

### Court of Common Pleas,

WASHINGTON COUNTY.

#### FOUSE v. BOROUGH OF WEST WASHINGTON.

*Ejectment—Municipal corporations—Motion for new trial—Motion for judgment non obstante verdicto.*

The borough of West Washington appropriated a lot of ground for a public street, having purchased it under an agreement believing the parties from whom they purchased had the legal title. Upon the trial it was proved that the legal title was in another, the plaintiff. Binding instructions for the plaintiff.

No. 102 November Term, 1905. Trial in ejectment. Motion for judgment *non obstante verdicto*. Motion for new trial.

· Opinion by McILVAINE, P. J. Filed June 24, 1907.

The undisputed evidence in this case as tried shows first, that the defendant borough is in possession of the lot in dispute in that it has taken and appropriated the same and constructed thereon a street for the use of the traveling public; second, that at the time it took possession of the same one, George H. Smith, was holder of the legal title to the same; third, that at or about the time the borough took possession of the lot to open a street thereon the said George H. Smith in writing agreed to convey the said lot to George T. Walker and J. M. Fulton for a certain consideration, and that said agreement has never been fully performed by either party; the agreement is as follows:

"Whereas, George T. Walker and J. M. Fulton, executors of the estate of S. Fulton, deceased, have taken the lot of George H. Smith in West Washington for the purpose of making a street; therefore this agreement witnesseth:

"That they, the said Walker and Fulton, agree to grade a lot of the same width, 30 feet, adjoining said lot on the east so that it shall be of the same slope and be like the one taken, within the space of one month from the date hereof, and shall construct a substantial board-walk along said street and a like fence along said lot. Then the said Smith agrees to take said lot in exchange for the one taken, and the parties of the first part being at the expense of making both conveyances, the said deeds to be executed and delivered on the completion of this agreement as aforesaid.

"Witness the hands and seals of the said first and second parties this 27th day of May, 1892. (Signed)

"J. M. FULTON.

"GEORGE T. WALKER.

"GEORGE H. SMITH."

Fourth, that the purpose of Walker and Fulton was to give the lot that was to be conveyed to them to the borough to be dedicated to use as a street; fifth, that the borough took possession with the understanding that the written agreement between Smith of the one part and Walker and Fulton of the other would be in good faith fully performed; sixth, that Walker and Fulton

have put themselves in such a position that they cannot now specifically perform said agreement; seventh, that the street laid out over this lot is part of the system of streets of the defendant borough and could not be closed up without great inconvenience to the traveling public; eighth, that the plaintiff is now the owner of the legal title of the said George H. Smith, having purchased the same at sheriff's sale.

At the trial the court, upon these undisputed facts, instructed the jury to return a verdict for the plaintiff. Was this error? We still think not. The borough could have by ordinance condemned this lot for public use as a street and taken it from the owners thereof by paying them such damages as would fairly compensate them or they could have taken it under an agreement with the owners. They undertook to do this, but dealt with only those who had an equity in the lot under an article of agreement, forgetting that the legal title was the superior title and that the owner thereof should have been consulted. In doing this the borough took the risk of the written agreement being fully carried out or of enforcing its specific performance. At the trial no suggestion was made that a conditional verdict be taken as in an equitable ejectment; but it was admitted in the plaintiff's opening that any judgment obtained by him would be under the control of the court and that the court would see that the rights of the public would not be interfered with if it could be avoided. Walker and Fulton not being parties to this suit, no judgment can be entered directly affecting them and the plaintiff's rights can only be worked out through the defendant borough who acted on the strength of its agreement with Walker and Fulton. As to what remedy should be invoked hereafter so as to do justice and equity to all the parties concerned, we have no suggestions to make. All we can now do is to give the borough an opportunity to be relieved from being ejected from the use of the lot in dispute as a street and thus protect the interest of the public and allow the plaintiff to use his legal title as a means of enforcing the payment to him of such damages as he may be equitably entitled to.

And now, June 24, 1907, the defendant's motions for judgment *non obstante veredicto* and for a new trial are overruled and judgment is entered on the verdict of the jury in favor of the plaintiff and against the defendant for costs and the land in dispute and described in the plaintiff's writ and statement, with stay of execution, provided the defendant pay the costs of suit and within twenty days from this date files in this court with the prothonotary thereof a bond in the penal sum of \$500 with good and sufficient surety to be approved by the prothonotary, conditioned to pay to the plaintiff, as the successor in title to the rights and equities of George H. Smith, the damages that may be adjudged him in any legal or equitable proceeding for the occupancy of the lot in dispute by the defendant borough as one of its public streets.

For plaintiff, *R. W. Irwin*.

For defendant, *James P. Eagleson*.

[From Harry Russell Myers, Esq., Washington, Pa.]

## Court of Common Pleas,

FAYETTE COUNTY.

### OHIO AND BALTIMORE SHORT LINE RAILWAY v. GALLA- GHER et al.

#### *Railroads—Abandonment of right of way— Ownership of rails.*

An abandonment by a railroad of its right of way does not give to the land-owner the right to appropriate materials of which the road is constructed without notice to the railroad company to remove them.

No. 20 December Term, 1904. Rule for judgment for defendants *non obstante veredicto*.

Opinion by REPPERT, P. J. Filed February 12, 1907.

In 1899, the defendants became the owners in fee of a tract of land situated in Dunbar township. By condemnation proceedings, at No. 239 June term, 1886, the plaintiff company obtained a right of way across the tract, upon which they constructed a portion of a switch or siding into an adjacent coke works. In April, 1904, the defendants took up and carried away from that portion

of the right of way crossing their land the rails laid thereon. The plaintiff brought an action of replevin. The defence is that the plaintiff had abandoned its right of way, whereby title thereto, including the rails laid thereon, reverted to the owner in fee. In support of their contention the defendants introduced testimony going to show that from a time even prior to their acquisition of the title the plaintiff had made no use of the track, had made no repairs to it, that its condition was such as to prevent operation, and that some three years before the bringing of the present action the defendants had extended their fences across the tract and right of way. And further, that under the provisions of the act of March 5, 1903, P. L. 13, providing that if any railroad company thereafter "for a period of six consecutive months shall omit to operate any portion or portions of its railroad, such railroad company shall be deemed to have abandoned, and shall be confined in the exercise of its franchises to the remaining portion or portions of its railroad," the plaintiff had forfeited any right it may have had to the rails in dispute.

As to defendants' contention that the rails, being annexed to the soil, became a part of the realty, which, upon abandonment, reverted to the owner in fee, it may be observed: Whether a structure is a fixture or not depends on the nature and character of the act by which it is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. *Justice et al. v. Railroad Co.*, 87 Pa. 28.

In the same case it is held that a railroad company taking land under condemnation proceedings obtains thereby an easement in the land condemned; that the structures attached thereto are subservient to the purpose of the easement; that the purpose is to build a railroad for public use; that in effecting this purpose there is no intention to dedicate the chattels entering into construction of the railroad to the use of the land, the necessity for their use being in the execution of the public purpose and not in connection with the land; that the track is not intended to be attached to the freehold, but is laid down as part of an easement under a franchise of the state. The con-

clusion to which this leads is that a railroad track erected on a right of way obtained by condemnation proceedings does not become a part of the realty, but that in relation to the freehold the materials of which it is constructed retain their character as chattels.

The title to the land included in the right of way over the defendants' tract cannot be tried in the proceedings, nor can we determine whether, by reason of the alleged abandonment by the plaintiff of that portion of its road title to that portion of the right of way has reverted to the defendants.

The most that we can find under the testimony is that some three years before the defendants appropriated the rails their fences along their boundaries had been extended across the right of way, thus including it within their lands, and that for a greater period the plaintiff had failed and neglected to operate and maintain that portion of its road. Whether these facts constitute an abandonment of the road it does not seem necessary to determine. In any event the defendant would have no greater rights than they would possess had the right of possession followed by actual possession reverted to them. Property may not be gained by the owner or one in possession of land simply because found upon it. Even if there had been an intent to abandon the easement held by the plaintiff such abandonment would not necessarily carry with it an intent to abandon the materials out of which the road was constructed, they not being a part of the realty. If title to the right of way had thus reverted to the defendants they could demand that the plaintiff should remove therefrom within a reasonable time the iron in dispute, and on failure so to do they could remove it themselves. But we cannot say that they have the right to appropriate it to their own use without first giving such notice.

As bearing upon the rights of the parties, what effect should be given to the act of assembly above referred to?

The act says that by omission of a railroad company to operate any portion of its railroad for six consecutive months, the company shall be deemed to have abandoned, and shall not have the right to maintain and operate, such portion, but shall be con-

finied in the exercise of its franchises to the remaining portion of its railroad. Giving the act its broadest signification, it can do no more than work a forfeiture of a railroad company's franchise rights as to such portion of its road as it fails to operate for six consecutive months. This would result in the reversion of the easement to the owner of the land. But can we declare the forfeiture of franchise rights, the determination of an easement, the reversion of a right of way, in this proceeding? It can only be by reason of such forfeiture, determination or reversion that the defendants make claim to the rails. But, as applicable to the facts in this case, would an abandonment under the statute place the defendants in any better position than abandonment by a course of conduct such as discontinuance of use and operation and failure to repair, for such length of time as clearly evinced the intent? The statute does nothing more than fix the period of time when such conduct shall be deemed abandonment and thus work a forfeiture of franchise rights. In our judgment it does not give to the landowner the right to appropriate the materials of which the road is constructed without notice to the railroad company to remove them.

For the reasons above given the motion for judgment non obstante verdicto is denied.

And now, February 12, 1907, after consideration, the motion for judgment for the defendants in this case non obstante verdicto upon the question of law is overruled, and it is ordered and directed that judgment be entered for the plaintiff on the verdict rendered by the jury on payment of the jury fee.

For plaintiff, *McDonald & Gray and Thos. H. Hudson.*

For defendants, *A. D. Boyd.*

That a provision in a will locates land devised in a section where testator owned no land is held, in *Lomax v. Lomax* (Ill.) 6 L.R.A. (N.S.) 942, not to admit parol evidence of a mistake in description, although he in fact owned land answering the description in another section, of which he did not dispose in the will.

# Pittsburgh Legal Journal

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No. 5.

PITTSBURGH, PA., AUGUST 14, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### SMITH v. DIAMOND.

*Equity—Agency—Conveyance of real estate—  
Evidence.*

In a bill filed to compel defendant to convey the balance of a lot to plaintiff, it being alleged that defendant purchased the lot as plaintiff's agent and unknown to plaintiff only conveyed to him a part of the lot, the plaintiff must prove satisfactorily the agency as well as the deception, and failing such proof the bill will be dismissed.

No. 896 January Term, 1907.

Opinion by YOUNG, J. Filed June 26, 1907.

This was a bill filed by the plaintiff to compel a conveyance by the defendant to the plaintiff of a lot of ground in McKeesport in this county, upon the ground that defendant was agent for the plaintiff to purchase the land, and fraudulently refused to convey the same to her. The plaintiff claims that in May, 1906, she employed the defendant as her agent to purchase a lot of ground in the city of McKeesport, fronting 29 feet and six inches on Water street and extending back of the same width 140 feet to Mulberry alley, and that she gave to the defendant the sum of \$1,500 to make the cash payment for the lot, and that the defendant subsequently caused a deed to be made to himself for the lot and only conveyed to her by his deed a portion of the lot, fronting 29 feet and 6 inches on Water street and extending back 65 feet, instead of 140 feet, thus retaining title to a portion of the lot, being 29 feet and 6 inches on Mulberry alley and extending back towards Water street 75 feet, and that a fraud was perpetrated upon her by defendant, which she did not discover until some months after the deed was delivered to her, and that

at the time she received the deed she could not read English, and that the deed was not read to her; that besides paying the \$1,500 she assumed a mortgage for \$3,300 then on the lot, and that the defendant took from her at the same time a mortgage for \$3,300 to secure his purchase money, which mortgage he refused to satisfy unless the plaintiff paid him the sum of \$325, which she did not owe to him, and thereby compelled her to pay the sum of \$325 thereby defrauding her of that sum. Every material allegation of the bill is denied by the answer. The plaintiff has not overcome this responsive answer by two witnesses or one witness and corroborating circumstances, nor is the evidence produced as to the alleged frauds so clear, precise and indubitable as to justify the court in finding that the deed conveying the lot to plaintiff does not convey all the land purchased from defendant by the plaintiff. For these reasons therefore the facts must be conceded in favor of the defendant, and we therefore make the following findings of fact:

#### FINDINGS OF FACT.

1. The defendant, J. Louis Diamond, by deed dated June 1, 1906, acknowledged June 13, 1906, and recorded June 23, 1906, and of record in deed book Vol. 1463, page 212, had conveyed to him by Morris Goodman and wife a lot of ground in the First ward of the city of McKeesport, being part of lot No. 12 in the original plan of the town of McKeesport, and bounded and described as follows: Beginning on the east side of Water street at a point 72 feet north of the corner of Fourth avenue and Water streets; thence along Water street in a northerly direction a distance of 29 feet and 6 inches; thence in an easterly direction parallel with Fourth street a distance of 140 feet to Mulberry alley; thence along said alley in a southerly direction a distance of 29 feet and six inches to a point; and thence in a westerly direction 140 feet to the place of beginning, for the consideration of \$4,800, \$1,500 in cash and subject to a mortgage then on the land for the sum of \$3,300.

2. The defendant, by his deed dated June 1, 1906, acknowledged August 27, 1906, and recorded August 31, 1906, and of record in deed book Vol. 1490, page 264,



conveyed to the plaintiff a part of said lot of ground described in the first finding of fact, namely, 29 feet and 6 inches on Water street by 65 feet deep, for the consideration of \$4,800.

On or about August 27, 1906, the plaintiff executed and delivered to the defendant a mortgage upon the land last described, bearing date June 1, 1906, acknowledged August 27, 1906, and recorded August 31, 1906, and of record in mortgage book Vol. 1283, page 168, for the sum of \$3,300, payable in two years, and recited in the mortgage that it was to secure the unpaid balance of the purchase money. This mortgage was satisfied by satisfaction piece recorded November 21, 1906, upon the payment by plaintiff to defendant of the sum of \$325 then due and owing to defendant.

4. During the month of May, 1906, the defendant had agreed to purchase from one, Morris Goodman, the lot of ground described in the first finding of fact, being a lot fronting 29 feet and 6 inches on Water street and running back of the same width 140 feet to Mulberry alley; and shortly thereafter the plaintiff negotiated with the defendant for the purchase of a portion of that land fronting 29 feet 6 inches on Water street and extending back of the same width a distance of 65 feet for the consideration of \$4,800, of which \$1,500 was to be cash and the balance the assumption of the mortgage for \$3,300 then on the property.

5. Early in June, 1906, about the time of her negotiations with the defendant for the purchase, the plaintiff paid to the defendant the sum of \$800 on account of the purchase money and at once entered into possession of the land under a lease from the defendant, and subsequently paid the balance of the cash purchase money, and a deed was delivered by the defendant to the plaintiff as set out in the second finding of fact.

6. At the time the plaintiff entered into possession of the lot the lot was measured in her presence, fixing the point to which her purchase of 65 feet would carry from Water street, and the plaintiff caused to be erected upon that line a fence separating her portion of the land from that portion of the lot the title to which still remained in the defendant.

7. The defendant did not act as agent for the plaintiff in the purchase of the land, but he having negotiated for the purchase of the land on his own account, was negotiating on his own account for the sale of a portion of it to the plaintiff.

8. The defendant was not guilty of any fraud in the sale of the lot to the plaintiff.

#### CONCLUSION OF LAW.

There being no sufficient evidence to satisfy us that the defendant acted as agent for the plaintiff in the purchase of the land, or that defendant was guilty of any fraud in the sale of the land to the plaintiff the bill must be dismissed.

For plaintiff, *Haymaker & Finley.*

For defendant, *A. C. Stein.*

(Common Pleas No. 2, Allegheny Co.)

### COMMONWEALTH ex rel. CONWAY v. KERR.

*Habitual drunkard—Hearing—Notice to next of kin.*

In an inquisition to declare a person an habitual drunkard notice of the hearing must be served on next of kin who are not parties to the petition. In default of such notice the proceedings will be quashed.

No. 1126 April Term, 1907.

Opinion by YOUNG, J. Filed July 11, 1907.

This is a petition to quash the return and finding of the commission declaring the respondent an habitual drunkard, and to set aside the appointment of the East End Savings & Trust Company as committee of the person and estate of the respondent. The original petition asking for the commission was presented to the court on March 18, 1907, and an order made at that time directing a commission to issue and appointing a commissioner, but no order was made by the court as to notice of the execution of the commission to the respondent or to any of her near relatives or friends. The commissioner appointed by the court fixed the second day of April, 1907, for the purpose of making inquiry, and this notice seems to have been served upon the respondent on March 23rd, but the notice was not served upon any other

person, and upon April 2nd the hearing was adjourned until May 14th, and a new notice directed to the respondent fixing May 14th as the time of the inquisition was made out by the commissioner. This notice appears to have been served on Mrs. Sarah Conway, the mother of the respondent, and also served upon the respondent herself. The notice to Mrs. Conway, the mother of the respondent, is bad, because she was the petitioner and not such person as provided by the act of 1836, to whom notice could be given. The notice to the respondent appears to have been served upon her on the very day of the inquisition. The commissioner reports that due notice was given to the respondent, Sarah D. Conway, mother of the respondent, and to Jeremiah Dunlevy and Paul Dunlevy, uncles of the respondent. The notice to Mrs. Conway was not good, as we have said, because she was the petitioner, and the notice to Jeremiah Dunlevy and Paul Dunlevy was not good because they are two persons who joined in an affidavit asking for the appointment, and are therefore not such persons as provided by the act of 1836, to whom notice could be given, because they must be assumed to be concerned in the application. The respondent sets forth in her petition that the notice of the inquisition was served upon her upon May 14th, only a few minutes before the hearing, and that it was impossible for her to appear either in person or by attorney. The return of the commissioner and jurors shows that the whole proceeding was completed on May 14th and filed in court on May 17th. The record in this case shows very clearly that that the whole proceeding was irregular from the beginning. The order granting the inquisition and appointing the commissioner should have directed notice to the respondent and to some near relative or friend not concerned in the application. Notice should have been given to the respondent or some person related to her not concerned in the application, at least ten days before the holding of the inquisition. A proceeding to declare a person a lunatic or an habitual drunkard, to deprive such a person of the possession of his property and even to some extent to deprive him of his personal liberty by the appointment of a

committee of his person, is such an important proceeding that every precaution should be taken to see that not only the person into whose sanity inquiry is being made receives notice but that some person not interested in the application should have notice in order that the rights of the alleged lunatic or habitual drunkard may be protected. We are satisfied from an inspection of the record in this case that the proceeding is so irregular and conducted with so little regard for the rights of the respondent that she ought not to be put to her traverse, but that the whole proceeding should be quashed and the appointment of the committee set aside.

And now, July 11, 1907, all the proceedings in this case are stricken down and the appointment of the East End Savings & Trust Company as committee of the person and estate of the respondent set aside.

For petitioner, *W. T. Tredway.*

For respondent, *John E. McCalmont.*

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## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

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### MARINE v. PITTSBURGH RAIL- WAYS COMPANY.

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*Street railways—Vehicles on track—Approaching cars—Attempt to avoid—Contributory negligence.*

The cartway of a public road along which plaintiff was living was occupied entirely by two tracks of a street railway. Plaintiff turned from one track upon the other in order to allow a car in the rear of his wagon, which had approached to within ten feet, to pass. At the time he turned there was a car coming toward him upon the other track about sixty feet distant. After the car in his rear had passed he pulled back upon the track he had left, but before he could do so his wagon was struck in the rear by the approaching car and plaintiff hurt. Held, that plaintiff could not recover as he should have waited until the approaching car had passed before pulling off the track for the car in the rear.

No. 999 December Term, 1903. Motion to take off non-suit.

Opinion by SWEARINGEN, P. J. Specially presiding. Filed June 20, 1907.

Plaintiff had been engaged in the fruit and produce business for some years prior to the injuries of which complaint is made

in this case in the borough of Duquesne, Allegheny county, Pennsylvania. About 10 p. m. of July 8, 1903, he was returning from Pittsburgh to his place of business. He was driving one horse to a wagon, which was loaded with fruit and produce. The plaintiff was seated in the front of the wagon, driving the horse, and the man who was with him was seated in the rear of the wagon. They were properly passing along Eighth avenue, in the borough of West Homestead, near Mesta street, when the accident happened, of which complaint is made. The defendant operates a double-track line of railway along said Eighth avenue. It is not a wide street and the two tracks of defendant occupy almost all of the cartway of the street at and near the place of the accident.

Whilst passing along the east bound track of defendant with his wagon as aforesaid the plaintiff was warned, by the ringing of the bell, of the approach of a car going eastwardly. He said that the car was about ten feet back of him. At the same time another car of the defendant was approaching on the west bound track, which the plaintiff testified was about "twenty paces" ahead of him. When the plaintiff heard the ringing of the bell on the car at his rear he turned northerly from the east bound track and drove upon the west bound track, in front of the car which was approaching upon the latter track. The car going eastwardly passed the plaintiff, and, in endeavoring to go back from the west bound to the east bound track, the rear of his wagon was struck by the said car upon the west bound track, and he was thrown upon shaft of the wagon and seriously injured.

There was no evidence as to the rate of speed at which these cars were running. There was evidence that the motorman upon the car which struck plaintiff's wagon was fastening the curtains or blinds of his car and was looking toward the rear of his car when it struck the wagon.

Having proved the foregoing substantially, the defendant moved for judgment of compulsory non-suit, on the ground that the evidence disclosed that plaintiff himself had been guilty of negligence which contributed to the accident. This motion was granted.

The plaintiff now moves that the judgment of non-suit be taken off.

The able argument of plaintiff's counsel has not convinced us that there was error in entering the judgment of compulsory non-suit. The plaintiff had an equal right with the defendant to be upon the east bound track. The only difference was that plaintiff was obliged to turn out and let the east bound car pass, because the car could not turn off the track. But he was not obliged to turn out in face of approaching danger, even though the motorman on the east bound car was warning him to leave that track. Common prudence required that he should have waited until the west bound car, which was not more than sixty feet away, should have passed, and then he could have gone upon the west bound track in safety. He did not do this. Instead, he drove right in front of the approaching west bound car, where he was certain to be struck, as the wagon was. The wonder is that the accident was not more serious.

We think this act of the defendant was negligence, which clearly contributed to the accident. If that is correct, of course the plaintiff cannot recover.

The motion is refused.

For plaintiff, *Waterson & Reid*.

For defendant, *Burleigh, Gray & Reed*.

## Court of Common Pleas,

WASHINGTON COUNTY.

**STURDY v. MORRISON.**

*Justice of the peace—Appeal—Transcript—Costs.*

Where the appellant from a judgment of a justice of the peace pays the costs but that fact does not appear on the transcript the appeal will not be quashed, there being nothing in the acts of 1885 and 1901 making the failure to note payment of costs on the transcript fatal to the appeal.

No. 179 August Term, 1906. In re rule to quash appeal.

Opinion by PER CURIAM. Filed April 18, 1907.

C. H. Sturdy sued J. R. Morrison before Henry Gantz, Esq., a justice of the peace, to recover "\$73.67 for work and labor done

and material furnished at the request of defendant." After hearing, the justice entered judgment in favor of the plaintiff for \$48.42. The defendant paid to the justice all the accrued costs and costs of appeal and filed the transcript of appeal. The plaintiff asks that the appeal be quashed; first, because the transcript does not show that the costs or any part thereof have been paid by the appellant; second, the transcript does not show that appellant entered bail absolute, etc.

There is nothing in the act of 1885 or the act of 1901 that makes the failure of the justice to receipt the payment of the costs on the docket fatal to an appeal taken after the costs accrued have actually been paid. In this case it is admitted that the defendant before he took his appeal paid all the accrued costs and the costs of appeal to the justice. The appeal therefore cannot be quashed for the first reason. Opinion of this court at No. 6 August Term, 1906.

Neither can it be for the second reason. Where there has been a failure on the part of an appellant to give proper bail the remedy is to rule him to perfect his appeal by giving the required recognizance. *Carbaugh v. Sanders*, 13 S. C. 361.

The defendant having paid all the costs to the justice the act of April 19, 1901, as to bail absolute does not apply.

And now, April 18, 1907, rule to quash the appeal discharged.

For plaintiff, *Samuel Amspoker*.

For defendant, *James R. Burnside*.

[From Harry Russell Myers, Esq., Washington, Pa.]

## Court of Common Pleas,

JEFFERSON COUNTY.

### GILLESPIE v. BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

*Railroads—Eminent domain—Damages—Elevation of roadbed.*

A railroad company cannot be compelled to make a second payment of damages for elevating its roadbed on its lawfully acquired right of way for which due compensation was made at the time of acquisition.

No. 212 November Term, 1901.

Opinion by REED, P. J. Filed March 25, 1907.

By the terms of the cases stated, a single question is presented for the consideration of the court, viz.: Can a railroad company be compelled to make a second payment of damages for elevating its roadbed on its lawfully acquired right of way for which due compensation was made at the time of acquisition? In this case the right of way was obtained by grant, the language of which vests a title coextensive with that acquired by condemnation under the right of eminent domain. The habendum clause of the grant is as follows: "To have and to hold the said right of way, rights and privileges to the use of said railroad company, so long as the same shall be required for the uses and purposes of said road in as full, perfect and ample manner as may be necessary for the purposes hereby intended."

The plaintiff seeks an affirmative answer of the above stated question on the adjudicated cases awarding damages to the abutting land-owner for injury resulting to his property from a change in the grade of a duly laid out and constructed highway or street, and cites the following authorities. *Jones v. Bangor Borough*, 144 Pa. 638; *O'Brien v. Phila.* Appellant, 150 Pa. 589; *Jones v. R. R. Co.*, Appellant, 151 Pa. 30. When land of a private owner is taken for the purpose of laying out a public highway the public acquires an easement in and upon the same for the purpose of travel. The only right vested in the public by such easement is that of free and unobstructed travel over the land. It is no more than a license to pass along and over the highway laid upon it. The right of property and of possession remain in the owner of the land for all other purposes, and he may exercise any lawful acts of ownership over the same which do not interfere with the public travel thereon. *Lewis et al. v. Jones et al.* 1 Pa. 336; *Wheelock v. Fuellhart et al.*, Appellants, 158 Pa. 359. Considering the nature and extent of the easement, it is not difficult to see how a change in the grade of the highway may work an injury to the proprietor of the soil within the meaning of Art. xvi, Sec. 8, of the Constitution. But the title to the property condemned by municipal and other corporations for public use, by virtue of the power of eminent domain, is essentially dif-

ferent from an easement, or right of travel in and along a public highway. The title acquired in condemnation proceedings vests in the corporation a base or qualified fee in the land, with the right of exclusive possession and enjoyment of the same. The land-owner's title is thereby completely divested, and he has no interest in or control over the land taken so long as it is used for the purposes for which it was condemned. *Reading City v. Davis*, Appellant, 153 Pa. 360; *Penna. S. Val. R. R.*, Appellant v. *Paper Mills*, 149 Pa. 18. In the latter case Mr. Justice Mitchell, delivering the opinion of the court, says: "Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructure including necessary foundations and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee." In the case of *Pittsburgh, Fort Wayne and Chicago Ry. v. Peet*, 152 Pa. 448, the court, by Mr. Chief Justice Paxson, said: "The vice of this argument consists in treating the plaintiff's right as a mere easement or right of way. It is a great deal more than a right of way. It has the actual possession of the property, and that possession is exclusive, at all times and for all purposes, except where a way crosses it. *Phila. and Reading Ry. Co. v. Hummel*, 44 Pa. 375; *Junction R. R. Co. v. The City of Philadelphia*, 88 Pa. 424. The estate acquired by a railroad company by a condemnation of land is often spoken of as an easement, but the term is used in a loose way for the purpose of distinguishing it from a fee." The precise question submitted for consideration in this case has been passed upon by the Supreme Court, and ruled adversely to the plaintiff's contention in *Hummel et al.*, Appellants, v. *Cumberland Val. R. R.*, 175 Pa. 537. The court in that case says: "It was as far back as the year 1839 that the Cumberland Valley Railroad Company adjusted, settled and paid to the former owners of the land, over which the bridge or viaduct in question was erected, 'all damages occasioned by the construction or use of the said road and the bridge over the Susquehanna so far as the same runs through their lands.' For the occupancy and use of the land of the then owners for the purposes of the railroad, the defendant paid them \$2,250. It is not, and it cannot be, questioned, that this was full compensation for all the acts done by

the railroad company in taking the land and building the road over it on piers then erected. The present proceeding is an effort to compel the same company to make a second payment of damages to the present owners who have succeeded to the title of the owners at that day. The excuse for such an extraordinary attempt is that the company has filled up the land under the bridge and between the piers, and this, it is claimed, gives rise to another right to have damages for the mere use by the company for their own purposes of the same land for which full compensation was paid almost sixty years ago. It is only necessary to say that this filling occupies only land under the bridge, between the piers and within the width of the lawful right of way of all railroads. The use of the ground is such as is entirely within the discretion of the company and it is not of any moment that this particular use was not made at an earlier date." The principle that "an action does not lie for a reasonable use of one's right, though it be to the injury of another," applies in this case, and, in the language of Mr. Justice Gordon, in *Penna. R. R. Co. v. Lippincott*, 116 Pa. 482, "it seems to be very clear that a private person could do with impunity, on his own property, just what this railroad company has done. He might build a house, and thus shut out his neighbor's view, light and air; he might build an embankment; or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment or road in a lawful manner, although in either case an injury may have been done to the adjacent property." It is not alleged that the defendant company has gone outside of the lines of its own property, or that it has directly encroached upon the land of the plaintiff. The injury complained of is of a consequential character, and arises from the elevation by the defendant of its road-bed within the limits of its right of way. This, as has been seen, it had a right to do, and the damages resulting therefrom are *damnum absque injuria*. *Penna. R. R. Co. v. Lippincott*, 116 Pa. 472; *Penna. R. R. Co. v. Marchant*, 119 Pa. 541.

And now, March 25, 1907, in accordance with the case stated, and for the reasons given in the foregoing opinion, judgment is directed to be entered in favor of the defendant.

For plaintiff, *Charles Corbet*.

For defendant, *C. Z. Gordon*.

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No. 6.

PITTSBURGH, PA., AUGUST 21, 1907.

## Circuit Court, United States,

WESTERN DISTRICT OF PENNA.

### SEESE'S ADMINISTRATRIX v. MONONGAHELA RIVER CON- SOLIDATED COAL & COKE COMPANY.

*Steamboats—Explosion—Employees—Injury—  
Suit for damages—Act of Congress of March  
3, 1851.*

Proceedings by an administrator to recover for the death of his decedent, resulting from an explosion upon a steamboat on which he was employed, will not lie in one district, if proceedings for the limitation of liability by reason of such explosion under the act of Congress of March 3, 1851, have been commenced in another district, and so prosecuted that the court has ordered that all persons having claims by reason of said explosion, be restrained from prosecuting them elsewhere. This is so, although the decedent's administrator was not appointed until after the institution of the proceedings under the act of 1851.

No. 26 May Term, 1907.

Opinion by EWING, J. Filed August 3, 1907.

This action is instituted for the purpose of recovering damages for the death of James A. Seese, alleged to have been occasioned by the negligence of the defendant company, while the decedent was employed on the towboat "Defender" owned by the defendant company, the boiler of which exploded on January 3, 1905, within the jurisdiction of the District Court of the United States for the Southern District of West Virginia, and which explosion killed said Seese.

The defendant now petitions to have this action dismissed on the ground that on January 14, 1905, it instituted proceedings in the District Court of the United States for the Southern District of West Virginia, under the provisions of the act of Congress

of March 3, 1851, for limitation of liability by reason of said accident, which said proceedings were so prosecuted that said court ordered that all and every person or persons who may have, or claim to have, suffered damage by reason of the blowing up and explosion of the boilers of the steamboat "Defender" on the 3rd day of January, 1905, and the personal representatives of all such persons, be restrained from prosecuting any suit or suits against the said "Defender" or her freight, or against the Monongahela River Consolidated Coal & Coke Company, by reason of said explosion, except in these proceedings, and that all and every person or persons who may have or claim to have suffered damage by reason of the blowing up or explosion of the boilers of the steamer "Defender" on the 3rd day of January, 1905, and the personal representatives of such of them as were killed by said explosion, be restrained from prosecuting any suits or proceedings at law except herein against the steam towboat "Defender," or her freight, or against the Monongahela River Consolidated Coal & Coke Company, by reason of said explosion."

To this petition the defendant attaches a certified copy of the record in the proceedings had in said District Court of West Virginia and the rule granted on the plaintiff to show cause why this action should not be dismissed.

In answer to this rule the plaintiff has filed a general demurrer, and on the argument of the rule, while admitting that said statute had been decided to apply to accidents of this character, and that proceedings to avail of the limited liability under its provisions could be instituted before suit brought on any claim for damages, yet insisted that the statute was not intended to apply as against a dead man and could not be urged against an administrator who had not been appointed at the time the proceedings were instituted or completed; and also on the ground of their claim, as set forth in the statement filed in this case, of alleged knowledge and privity on the part of the defendant.

An answer to the last point will be found in *In re Whitelaw*, 71 Fed. Rep. 733, in which case it is distinctly declared that the

court in which proceedings are instituted for the purpose of obtaining the benefit of the provisions of said act of 1851 is the court, and the only court which can determine whether there is knowledge and privity on the part of the owners of the vessel; and the case of *Providence & New York Steamboat Co. v. Hill Mfg. Co.*, 109 U. S. 578, which decides that the court in which such proceedings have been instituted under the provisions of the act of 1851, has exclusive jurisdiction of all claims for damages.

The fact that Seese's administratrix was not appointed until after the monition issued in the District Court of West Virginia, possibly not until after the return day thereof, is not sufficient to give this court jurisdiction. Administration could have been had at any time after the death of Seese, and if the fact that it was delayed until after orders and decrees were made in the court in which proceedings had been instituted under the act of 1851 would avail, there would be an incentive in every such case to delay administration until such date and thus avoid the effect of such proceeding. The intent of the act was to give the court in which such proceedings were instituted exclusive and inclusive jurisdiction to settle in that one proceeding all claims arising out of the accident upon which said proceedings were based.

If any grace is to be allowed and excaption made by reason of the fact that there was no personal representative of the deceased at the time the order was made in that court, application therefor should be made there.

The rule is made absolute and the action is dismissed for want of jurisdiction.

For plaintiff, *P. M. Smith.*

For defendant, *McIlvain, Murphy & Jones.*

A person who has the fixed habit of frequently getting drnnk is held, in *Page v. Page* (Wash.) 6 L. R. A. (N. S.) 914, to be an habitual drunkard within the meaning of the divorce laws, although he has more sober than drunken hours, and the habit does not incapacitate him from performing, during the working hours of the day, ordinary, unskilled, manual labor.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### HUFFMAN v. ST. CLAIR TERMINAL RAILROAD COMPANY.

#### *Railroads—Use of streets—Townships.*

A street was laid out in a plan of lots in a township but was never accepted by the township authorities, and a railroad company used part of the street for an embankment. Later the B railroad erected a pier on the part of the street used by the other railroad. On a bill by a property owner to restrain B it was held. The cases relating to the use of a street in a city or borough did not apply. Under the act of 1849 B had a right to use the street, and was obliged to supply it place. The street being already in use by another railroad the question was a matter between the two railroads.

No. 1044 October Term, 1906.

Opinion by FRAZER, P. J. Filed May 20, 1907.

This bill was filed for the purpose of enjoining defendant from erecting a pier or abutment in what plaintiff alleges to be a public road called Railroad street, in Jefferson township. From the bill, answer and proofs, we find the following facts:

#### FINDINGS OF FACT.

1. By deed dated May 1, 1901, plaintiff purchased from George W. Blair and others lots Nos. 14, 15, 16, 17 and 18 in a plan laid out by the heirs of James Blair, recorded in the Recorder's office of Allegheny county in plan book 13, page 140, the lots together being triangular in shape, fronting on State street 227.15 feet, having a depth of 139.90 feet along the line dividing lots Nos. 13 and 14, and a front on Railroad street of 310 feet. The land is situated in Jefferson township and has erected thereon a two-story frame house located near the angle formed by the intersection of the two roads, known respectively as Railroad and State streets. Lot No. 14 was purchased by defendant from plaintiff a short time before work was commenced on the bridge complained of.

2. Defendant is a corporation organized and existing under the General Railroad act of April 4, 1868, and has constructed and is now operating a steam railroad.

3. As a part of its railroad, defendant

constructed a branch line which crosses Railroad street near the property of plaintiff on a bridge at an elevation of about 25 feet above the surface of the land, and in the construction of the bridge erected a concrete pier or abutment upon a portion of the land embraced within the line of Railroad street as laid out in the plan referred to in the first finding of fact, which pier at its base is about 11 feet in width, 30 feet in length and 25 feet in height. Opposite the concrete pier and 23 feet distant therefrom, on the lot purchased by defendant from plaintiff, defendant has also erected a pier upon which is placed iron supports for its overhead bridge. The concrete abutment is about 25 feet distant from the nearest corner of plaintiff's land.

4. The bridge of defendant above referred to was constructed for the purpose of carrying its branch railway across the tracks of the Pennsylvania Railroad Company above grade, and was reasonably necessary for that purpose.

5. Previous to the incorporation of defendant company and the location of its branch referred to in the third finding of fact, the Pennsylvania Railroad Company, which is a corporation of this State organized for the purpose of constructing and operating a railroad, widened its right of way along Railroad street where it adjoined plaintiff's property, and in so doing appropriated at least 11 feet of the northerly side of the street, which strip is occupied principally by the south slope of the roadbed of the railroad company.

6. The concrete pier erected by defendant, while occupying a portion of the land included in Railroad street as originally laid out, is also entirely within the portion of the street occupied by the south slope or embankment of the Pennsylvania Railroad Company's roadbed.

7. Railroad street as laid out in Blair's plan above referred to, adjoins and runs parallel with the right of way of the Pennsylvania Railroad Company. It is not improved and is not generally used by the public, and was never worked upon by the township authorities. State street is what is known as a county road, having been improved under the act of June 26, 1895, P. L. 336.

#### CONCLUSIONS OF LAW.

1. In the erection of the bridge complained of, defendant has not occupied a street of a city or borough. Consequently, the cases cited by plaintiff's counsel do not apply. The so-called street, partly occupied by the pier of defendant's bridge, is merely a country road existing only upon a plan of lots laid out by the owner of the property. The testimony fails to show that the road was ever opened and worked upon or even recognized as a highway by the township authorities. It was never generally used by the public. The testimony, however, shows that occasional trips were made upon it by wagons going to and coming from an ice house connected with a nearby brewery. If we consider Railroad street a public road, it was, as such, subject to be taken by the railroad company under the provisions of the act of 1849. For the purposes of this case, we will assume that Railroad street is a public road. The testimony shows that part of the land included within the road was appropriated by the Pennsylvania Railroad Company, and was occupied by that company at the time the pier complained of in this case was constructed; that the railroad company had the right to take the land included within the street is clear, the only restriction upon it being that it provide another suitable highway in its place. That company having occupied a portion of the road with the south slope of its right of way, that portion immediately thereupon became as much a part of the railroad company's right of way as the roadbed itself, and the duty rested upon the company to reconstruct the road. Such being the case, the erection of the pier by defendant in the slope of the right of way of the Pennsylvania Railroad Company became a matter between those two companies and does not concern plaintiff. Plaintiff's lot is on the opposite side of the street from the pier and at least 25 feet distant from its nearest corner. No portion of his property is taken by the pier, and no part of the street not previously occupied by the Pennsylvania Railroad Company is occupied by the defendant's pier, and even if the pier or abutment is upon the road, under the act of 1849, defendant had the right to place it



there, subject only to the duty of providing another road. Under these circumstances, plaintiff is not entitled to the relief prayed for. If, however, he has sustained any damage for which he is entitled to recover, he has an ample remedy at law.

Let a decree be drawn dismissing the bill at plaintiff's cost.

For plaintiff, *John R. Speer* and *G. A. Johnson*.

For defendant, *Reed, Smith, Shaw & Beal*.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### BROWN v. PENNSYLVANIA MALLEABLE COMPANY et al.

*Contract—Forfeiture—Cancellation—Option of one party.*

A licensed B a manufacturer to use a patent for journal boxes. The agreement provided for cancellation January 1, 1905, on notice before that date, but if not cancelled on that date the minimum royalty should be \$3,600 per year, a failure to earn the minimum or make up the deficiency within thirty days to work a cancellation of the contract. The agreement further provided that upon failure to pay any of the unearned minimum the agreement should be cancelled at the option of A. B gave notice of cancellation January 3, 1905. On bill in equity filed by A for an accounting held. The notice of cancellation being too late, A was entitled to the minimum royalty for a year and thirty days after January 1, 1905. The provision for cancellation mentioned was an absolute one. *Galey v. Hellerman*, 123 Pa. 491, and the oil and gas lease cases distinguished.

No. 1270 April Term, 1906.

Opinion by SHAFER, J. Filed July 25, 1907.

The bill is for an account.

#### FINDINGS OF FACT.

1. On and prior to October 1, 1903, the complainant was the owner of certain patents for the construction of journal boxes.

2. At that time the defendant company was engaged in the business of manufacturing such boxes and a written agreement was entered into between the complainant and the respondent company dated October 1, 1903, printed as Exhibit A of the bill, by which the complainant licensed the respondent company to manufacture and sell

such boxes under his patents and any improvements that might be made thereon, and agreed that the company might have the sole right to manufacture such boxes in the United States for ten years from January 1, 1904, and the company agreed to pay him a royalty of 12½ cents for each box sold by it under the agreement, and agreed to furnish the complainant with a quarterly statement of the sales.

3. The agreement contains the following provision:

"It is mutually understood and agreed that from the date hereof until January 1, 1905, no specified minimum amount of royalties shall be paid by the second party, or demanded by the first party, and the second party, on ten days written notice to the first party before the expiration of the calendar year of 1904, may cancel this contract from December 31, 1904, and in that event it shall not be liable to pay to the first party any other royalties than those actually earned on sales made during the year 1904, but in the absence of such cancellation by the second party at the expiration of the year 1904, thereafter during the continuance of this contract the minimum amount of royalties to be paid shall be \$3,600 per annum. A failure to earn said minimum, or, if it be not earned, a failure on the part of the second party to make up any deficiency within thirty days after the expiration of any one year, shall work a cancellation of this agreement."

4. The contract further provides that "upon the termination of this agreement in any of the ways herein provided, the party of the second part shall not be relieved from the payment to the party of the first part of all royalties due him for business done to the time of the termination of the said contract, including the proportionate share of the minimum royalty herein provided for, after the year 1904."

5. The succeeding provision of the contract is as follows: "The failure of the party of the second part to pay the royalties earned as hereinbefore provided for thirty days after the same shall have become due and payable \* \* \* shall at the option of the party of the first part work a cancellation of this contract and all rights of the second part hereunder."

6. At or about the time this contract was made, the complainant was working at the works of the defendant company in Allegheny county, and continued to work there until about March, 1905. During this time

a number of boxes were made under the patent, but the defendants were unable to sell any of them for the reason that the method of construction required so much machine work that the boxes could not be produced at a price at which they could compete with those of other makers. The defendant company gave no notice before the end of the year 1904 of its desire to cancel the contract, but about the third of January, 1905, delivered to the complainant a note dated December 31, 1904, in which they undertook to cancel the contract and notified him that nothing more would be manufactured under it. The complainant remained as stated in the employ of the defendant company until some time in March, 1905, and knew that the manufacture of boxes had been abandoned by the defendant company.

#### CONCLUSIONS OF LAW.

1. The principal question in this case is whether the failure to earn a minimum royalty, *ipso facto*, put an end to the agreement unless the defendant company chose to prevent its being so ended by paying to the complainant the difference between the royalty earned and \$3,600, or whether, on the other hand, the failure to earn the minimum is merely a cause of forfeiture of the rights of the company under the contract, which the complainant might or might not enforce at his pleasure. The complainant relies upon the oil and gas lease cases, *Galey v. Kellerman*, 123 Pa. 491, and a number of similar cases, in which it was held that where there was a covenant on the part of the lessee to drill a well or pay a sum of money, and a provision that a default in either respect should render the lease null and void, was merely a clause of forfeiture for the benefit of the lessor, and not a limitation.

We are of opinion, however, that in the present case it was intended that the failure to earn the minimum, or, in case it was not earned, to pay it within thirty days, was to put an end to the contract without any action upon the part of either. We are led to this conclusion, first, because this case differs materially from the cases above referred to in that there is no express contract to pay a definite sum of money or do a particular thing; second, because in another

part of the contract where provision is made for the payment of royalties actually earned, it is provided that a failure to pay the same for a certain time shall work a cancellation of the contract, "at the option of the party of the first part." The use of these words in one paragraph in reference to a cancellation which is to be the result of the non-payment of money actually due, and their omission in the other where the cancellation is to take place upon the failure of the enterprise itself, seems to us to indicate that the parties meant to make the distinction above suggested; and third, the nature of the contract itself makes it highly improbable that the respondents intended or the complainant supposed them to intend to bind themselves to pay \$3,600 a year for the term of ten years for the use of a patent which might at any time be superseded.

2. As the respondents failed to give a written notice before the end of the year, 1904, of a cancellation of the contract, the contract remained in force until thirty days after the end of the year 1905, at which time the failure to earn any royalty during that year and the fact that the company did not choose to make up the deficiency, put an end to the contract according to our interpretation of it. The respondents, therefore, owed complainant at that time \$3,600 minimum royalty for the year 1905, together with the proportionate share of the minimum royalty for the year 1906, which, for thirty days, amounts to \$296, it being expressly provided in the contract that the termination of the contract in this way should not relieve the respondents from all royalties due, including the minimum royalty so provided for.

3. It is contended by the respondents that this is not a case for equity jurisdiction. No such claim was made by way of demurrer or answer, and it is admitted that upon the face of the complainant's bill, jurisdiction in equity is fully shown, but it is contended that, as it now appears that the complainant knew that no boxes had been actually sold by the respondents and no royalty earned, at least at the works at which he was employed, and all that he can claim therefore is his minimum royalty, he should have resorted to an action of assumpsit for

the minimum. We are of opinion, however, that as the bill shows a case for equitable jurisdiction and the complainant was entitled to a discovery of what use had been made of the patent by the respondents, he is entitled to maintain his bill, even though it appears that there is but a single item in the account.

4. As it appears and is not denied that no royalty was in fact earned by the respondents, and the dispute between the parties is reduced to the single item of the minimum royalty for the year 1905 and the proportionate share of it for the thirty days of 1906, no further accounting is necessary and the court is now in position to make a final decree as if upon an accounting had been between the parties.

It is therefore adjudged and decreed that there is due from the Pennsylvania Malleable Company, one of the respondents, to Perry Brown, the complainant, the sum of \$3,896, with interest from February 1, 1906, in full of all accounts between said parties arising out of the contract of October 1, 1903, for the use of certain patents therein described, and it is ordered and decreed that the said respondent pay to the said complainant the said sum of \$3,896, with interest from February 1, 1906, and that the said defendant company pay the costs.

For plaintiff, *Geo. E. Reynolds.*

For defendant, *Reed, Smith, Shaw & Beal.*

When a railroad company is fully advised of a quarantine which will make the uninterrupted journey of a passenger impossible, and undertakes through its conductor to inform him on the subject of quarantine, it is held, in *Hasseltine v. Southern R. Co.* (S. C.) 6 L. R. A. (N. S.) 1009, that it will be liable for the consequences of failing to inform him of the one which will interfere with his journey.

A novel question as to the rights of a secured creditor against a bankrupt is decided by the Texas Court of Civil Appeals in *Jungpecker v. Huber*, 101 Southwestern Reporter 152. The creditor held a note secured by a vendor's lien as well as by a mortgage on real property. After the execution of the mortgage the property became a part of the mortgagor's homestead, and

after he was adjudged a bankrupt it was by the court set aside to him out of a larger tract, which, including all improvements, exceeded in value \$5,000. The creditor brought suit in a state court against the trustee of the bankrupt to foreclose the liens on the property, though the note was not due. This the court held he could do.

One who, by fraudulent representations as to her age and occupation, procures a student's reduced-fare railroad ticket, is held, in *Fitzmaurice v. New York, N. H. & H. R. Co.* (Mass.) 6 L. R. A. (N. S.) 1146, not to occupy, while traveling upon it, the relation of passenger towards the carrier, but to be a trespasser, and to have no right to recover for injuries received while upon the train, unless they were received under circumstances which would entitle a trespasser to recover.

Where a common carrier becomes liable to the consignee of goods for damages to the property received in transit, and the amount of such damages equals or exceeds the freight bill on the damaged goods, the lien of the carrier is held, in *Missouri P. R. Co. v. Peru-Van Zandt Implement Co.* (Kan.) 6 L. R. A. (N. S.) 1058, to be thereby extinguished, and the consignee is held to be entitled to the possession of such goods without payment of freight; and in such a case refusal of the carrier to deliver the goods to the consignee upon demand is held to constitute a conversion.

A grantor in a deed conveying land to a trustee for the use and benefit of the grantor, who is to receive the net profits of the property on demand, and who reserves the absolute and unlimited power of disposing of the land in fee, which, if unconveyed upon the grantor's death, is to be conveyed to his children or their descendants is held in *Meyer v. Barnett* (W. Va.) 6 L. R. A. (N. S.) 1191, to remain the owner, at least of an equitable estate in fee simple in the land, where, upon consideration of the whole deed, it appears that the intention to reserve to the grantor the absolute and unlimited power of disposition of the land in fee simple is paramount to and intended to prevail over any words of the deed indicating that a life estate only in the land is reserved to the grantor.

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PITTSBURGH, PA., AUGUST 28, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### PETGEN v. M'KNIGHT.

*Equity—Specific performance—Inadequacy of consideration.*

An agreement partly evidenced by writing to transfer a half interest in patents and a large amount of stock in consideration for raising money for an experimental plant for testing patents will be enforced in equity.

No. 671 April Term, 1906.

Opinion by FRAZER, P. J. Filed June 24, 1907.

The purpose of this bill was to compel defendant to transfer to plaintiff one-half interest in shares of stock held by defendant in the International Metal Savings Company, and also to assign to plaintiff a one-half interest in certain foreign patents. From the bill, answers and proofs, we find the following facts:

#### FINDINGS OF FACT.

1. Defendant is the patentee of a process relating to the treatment of ores for the recovery of metals by volatilization, and also the patentee for certain improvements in electro-magnetic separators, a list of such patents being attached to plaintiff's bill.

2. The International Metal Savings Company is a corporation formed for the purpose of using and selling defendant's process for the treatment of ores; its capital stock is \$5,000,000, divided into 1,000,000 shares of the par value of \$5 each, 550,000 of such shares standing in defendant's name. The company owns and controls the patents granted to defendant by the United States for the process referred to in the preceding finding of fact.

3. Defendant being desirous of erecting an experimental working plant for the pur-

pose of testing the utility of his patented volatilization process and demonstrating its practicability, proposed to plaintiff to assign to him a one-half interest in the letters patent granted him by foreign countries and also one-half of the shares of stock held by him in the International Metal Savings Company, if plaintiff would raise the sum of \$5,000 to be used in erecting such experimental plant.

4. Plaintiff accepted defendant's proposition, and induced a number of Pittsburgh capitalists, who are interested in gold and silver mining properties, to furnish funds necessary to build and equip an experimental plant, the same to be constructed in the City of Pittsburgh under the supervision of plaintiff and defendant.

5. An experimental plant was erected in Pittsburgh at a cost exceeding the sum of \$5,000, which amount was paid by the Pittsburgh capitalists who were interested in the project by plaintiff. Tests of the process were made by defendant at the experimental plant after its completion, which were unsatisfactory, and nothing further was done in the matter by the Pittsburgh people.

6. About the time of making the agreement between defendant and the Pittsburgh capitalists for the erection of the experimental plant, defendant, before leaving Pittsburgh for New York on a visit, signed and delivered to plaintiff a memorandum in writing, which was intended to confirm their previous verbal agreement in regard to a transfer to plaintiff of an interest in the patents and shares of stock, referred to in the first and second findings of fact. The paper referred to is as follows:

"PITTSBURGH, July 27, 1905.

This is to certify that C. J. Petgen is joint, equal owner in all interests and patents owned by Robert McKnight.

ROBERT MCKNIGHT. [SEAL]

NANIE E. PETGEN."

This paper was intended to be followed, upon defendant's return from New York, by a formal assignment and transfer, setting forth in detail the property assigned. This assignment, however, has not been prepared and executed by defendant.

7. At the time of entering into the agreement above referred to with plaintiff for the

transfer to him of an interest in the foreign patents and shares of stock in the International Metal Savings Company, defendant was without sufficient means to enable him to erect a plant for demonstrating his process and without the assistance of plaintiff could not have induced the Pittsburgh capitalists to advance the money necessary to erect the plant.

#### CONCLUSIONS OF LAW.

1. The evidence warrants no other conclusion than that defendant agreed with plaintiff to assign and transfer to him a one-half interest in his foreign patents and also an equal interest in the stock held by him in the International Metal Savings Company, for his influence and assistance in inducing the Pittsburgh capitalists to provide means for the erection of an experimental plant. While the consideration at first glance would seem to be unreasonable for the services rendered, it must be borne in mind that defendant was entirely without either funds or facilities to enable him to bring his process to the attention of prospective buyers. His previous efforts to induce investors to take hold of his patents, were failures, and the small plants previously erected by him had failed to establish the practicability of his process. Under these circumstances, the stock of the International Metal Savings Company, which is represented by the American patents of defendant, was of little or no value, and in default of evidence to the contrary, it may be assumed that the foreign patents which covered the same process, were also of small value. The agreement is not, therefore, so one-sided as would at first seem to be.

2. Defendant having agreed to assign and transfer to plaintiff a one-half interest in his foreign patents and also one-half of the shares of stock in the International Metal Savings Company held by him, in consideration for services, which services have been rendered by plaintiff, and there appearing no valid reason why he should not comply with his contract, a decree should be made requiring performance as prayed for.

Let a decree be drawn accordingly.

For plaintiff, *Marron & McGirr*.

For defendant, *Geo. W. Acklin*.

(Common Pleas No. 2, Allegheny Co.)

### TROUTMAN v. GORDON.

*Trusts—Confidential relation—Burden of proof.*

L made a will drawn by defendant and providing principally for the support of an old lady. At the same time he gave defendant an order on his bank for all his money deposited there. Defendant occupied a close relationship with L, and there were a number of declarations of the parties to the effect that the bank money was intended for the support of the old lady. Held that defendant was bound to prove satisfactorily that the money was his, and failing to do so it would be decreed to the trust for the old lady.

No. 805 April Term, 1907.

Opinion by FRAZER, P. J. Filed May 8, 1907.

The purpose of this bill is to have defendant declared trustee of certain money transferred to him by decedent during his lifetime. From the bill, answer and proofs, we find the following facts:

#### FINDINGS OF FACT.

1. John Ludy, a resident of the city of McKeesport, died January 5, 1907. By his last will and testament, dated December 17, 1906, and duly probated, testator, after providing for the payment of his debts, made distribution of his property as follows: "I bequeath all my property, both personal and real, to my beloved friend, Elizabeth Surgeon, for her use so long as she may live, and after her death the real estate to be sold to the highest bidder and the proceeds thereof to be equally divided between my two brothers, Mathias Ludy and Isaac Ludy, now residents of Schofflock, Gutenberg o-a Kirchheim an der Teck, Koenigreich Wirtemberg, Germany, to be their sole and absolute property."

2. John Ludy was forty-eight years old at the time of his death, and during the last thirteen years of his life made his home with Elizabeth Surgeon, who is now eighty-seven years old and quite infirm. In speaking of or to Mrs. Surgeon, Ludy invariably referred to her either as "mother" or "the old lady," and in conversations with friends frequently expressed an intention to provide for her in the event of his death occurring before hers.

3. In a will made by Ludy, October 18, 1906, which was prepared by defendant and his son about midnight and at a time when Ludy was seriously ill, provision was made for Mrs. Surgeon by devising to her testator's interest in certain real estate and also providing that his executor, R. W. Gordon, Sr., the defendant herein, should use the residue derived from the sale of real estate "and any other moneys which may come to my executor as being due my estate, in taking care of the said Mrs. Surgeon." At the time of executing this will, Ludy remarked to the persons witnessing it "that mother would be taken care of."

4. At the time of executing the will referred to in the preceding finding, John Ludy gave to defendant an order in writing on the McKeesport Title & Trust Company, directing that company to pay to defendant the money which Ludy had on deposit with the trust company. That order was without date, and did not recite any amount. When presented to the trust company, the date and also the amount of Ludy's deposit, namely, \$1,056.56, were filled in by the clerk to whom the order was presented. The amount of the deposit was not drawn out by defendant, but after consultation with the clerk of the trust company, to whom the order was presented, the account was changed from the name of John Ludy to the name of "Robert W. Gordon, Special." The deposit still remains under the latter head.

5. At the time defendant presented the order or check of Ludy to the McKeesport Title & Trust Company, he stated to the clerk to whom it was delivered that the order was for the entire amount of Ludy's deposit, and was to be transferred to an account to be used for the purpose of taking care of the "old lady." This was understood by the clerk to refer to Mrs. Surgeon. The amount of the deposit was thereupon ascertained from the trust company's books, and inserted in the order, and the account continued at the same number and page upon the books of the trust company under the name of "R. W. Gordon, Special." This action rendered unnecessary the opening of a new account, and preserved to the account all accumulated interest.

6. The day after the burial of John Ludy, defendant called at the office of the McKeesport Title & Trust Company for the purpose of withdrawing the money that had been transferred from the name of John Ludy to his name as a special account, saying that he had been advised by his attorney to transfer the account to a bank located out of town. The deposit being an interest bearing account, its withdrawal was refused except upon notice in accordance with the trust company's rules.

7. Defendant had known Ludy for seven years and had been intimate with him for three or four years before his death. Defendant and Ludy had frequently visited each other, and defendant had on several occasions given Ludy the use of his horse and buggy, made purchases for him, had visited the City Treasurer's office at the request of Ludy and paid taxes for him, and had at his request taken deposits of money to the trust company for him. Defendant's wife and daughter had also, during the illness of Ludy and especially in the spring and fall of 1906, visited him and took to him food which they had prepared for him, the daughter upon one occasion remaining with Ludy an entire day waiting upon him. For her kindness and services, Ludy gave Miss Gordon upon one occasion the sum of \$20 and at another time the sum of \$10.

8. Defendant's contention is that the deposit of \$1,056.56 was an absolute gift to him from Ludy, and was free from any trust or charge for the support of Mrs. Surgeon, while, on the contrary, plaintiff contends that defendant was created a trustee for the purpose of providing for Mrs. Surgeon.

9. By writing filed and offered in evidence, a copy of which is attached to plaintiff's bill, marked Exhibit B, Mrs. Surgeon, for whose benefit plaintiff claims defendant holds as trustee the sum of \$1,056.56 and the accumulated interest thereon, being the amount of testator's deposit in the McKeesport Title & Trust Company, has declared the same terminated and at an end, and authorized defendant to pay the fund together with accrued interest thereon to plaintiff herein.

#### CONCLUSIONS OF LAW.

1. That there was to some extent a con-

fidential relation existing between defendant and Ludy, is established by the testimony. During the last three or four years of Ludy's life, he and defendant were in each other's company quite often. Defendant visited Ludy at the latter's home, and Ludy occasionally called at defendant's home. In addition to these social visits, Ludy's confidence in defendant was shown by the fact that he occasionally gave the defendant money to deposit in the trust company for him, also trusted him with money to pay taxes, and at times requested defendant to make purchases for him at nearby stores. The degree of reliance which the testimony shows Ludy placed in defendant, while not of a highly confidential nature, was sufficient to cast upon the defendant in this proceeding the burden of showing that the deposit in question was a free and voluntary gift to him exempt from any trust or condition. This, in our opinion, he has failed to do. On the contrary, the weight of the testimony clearly establishes an intention on the part of Ludy that the deposit, together with other property, should be used for the purpose of providing for Mrs. Surgeon in the event of his death. The testimony of disinterested witnesses was all to that effect, and even the defendant's son, while he testified that the money was a gift to his father, said that Ludy at the time the order was given said to his father, "I want you always to look after the old lady and see that she is not put in the poor house." The testimony does not show any substantial reason for Ludy making defendant the recipient of his personal property. Certainly the few neighborly attentions shown him by defendant and his wife and daughter would not induce it. Outside of his deposit in the trust company, Ludy's personal property consisted of a few medicines of little or no value; he also owned a half interest in the lot and small house of four rooms in which he and Mrs. Surgeon lived, the latter not of itself sufficient to provide for the wants of Mrs. Surgeon. In view of the fact that Ludy's intention and desire was to have Mrs. Surgeon taken care of after his death, it seems unreasonable that he would part with the very fund that must be principally relied upon to carry out his wishes. Upon

consideration of all the testimony, we can reach no other conclusions than (1) that defendant has not shown his right to the deposit in question by that degree of testimony requisite under circumstances similar to those in this case and (2) that Ludy's intention was that defendant should hold the deposit in controversy as a trust for the support of Mrs. Surgeon. This conclusion, we think, is in accord with the contents of the will of October 18, 1906, which was drawn by defendant and his son, and is referred to in the third finding of fact. If such was not the case, and the money was intended as a voluntary gift to defendant, why was it not either withdrawn from the trust company by defendant or re-deposited in his own name free from any word indicating in him only a special property in the fund.

2. Mrs. Surgeon having terminated the trust which we have found to exist and by which defendant holds the sum of \$1,056.56 with interest, defendant should be required to account for and pay over to plaintiff, as executor of John Ludy, deceased, the fund deposited in the McKeesport Title & Trust Company in the account designated "R. W. Gordon, Special."

Let a decree be drawn accordingly.

For plaintiff, *Eaton & Seifert*.

For defendant, *M. Wilson Stewart*.

## Court of Common Pleas,

CRAWFORD COUNTY.

### LORD CO. v. O'BRIEN.

#### *Mechanics' lien—Amendment—Estoppel.*

A mechanics' lien void for the lack of the notice required by the act of 1901, cannot be amended on the ground of estoppel, because the defendant requested the lien to be filed, where it appeared that such request was not complied with at the time, and that the plaintiff filed his lien shortly before the expiration of the six months, and not in pursuance of the request, but standing upon his rights.

No. 1 November Term, 1906. Sur rules to strike off and to amend mechanics' lien. Opinion by THOMAS, P. J. Filed March 24, 1907.

The claimants in this case are sub-con-

tractors, and filed their lien without giving notice of an intent so to do, and without averring in their claim the giving of such notice or setting forth any reason or excuse for not having done so. Defendant obtained a rule to strike off same for matters appearing of record, when claimants procured a rule to amend on the ground of estoppel by having requested that said lien be filed. Both rules were obtained after the statutory period for filing liens had expired.

The requirements of the mechanics' lien act of 1901, with reference to notice by a sub-contractor of an intent to file a lien, are mandatory, and failure to comply therewith is fatal to the lien. *Wolf Co. v. Penna. R. R.*, 29 Sup. Ct. 439; *Collins v. Penna. R. R.*, 29 Sup. Ct. 547; *Knolly v. Horwath*, 208 Pa. 487; *Crider v. McCafferty*, 13 Dist. Rep. 638.

It is true that it is not necessary that a copy of the notice be set out, but reference to the serving thereof is necessary, and the notice itself cannot be amended. *Am. C. & F. Co. v. Alexandria Water Co.*, 215 Pa. 520; *Thirsk v. Evans*, 211 Pa. 239.

It would seem, therefore, that the lien on its face is void and should be stricken off. Can it be amended by setting up an estoppel?

In the first place, it is doubtful if it can be amended even by setting up the alleged estoppel. The act of 1901 provides for certain amendments, under certain conditions, but this has not been brought within the conditions. It is desired to insert, as a reason for failure to set forth a reason for failure of notice, certain facts that would excuse said notice. If that were available now, it should have been inserted at the time of filing the claim. There is no averment that the same was omitted through mistake or inadvertence, and could not be allowed.

The time for filing a claim had passed before the rule was obtained and claimants had no valid lien at the time, but for the reasons set forth by claimants, we know of no reason why they would not as nearly support a claim filed long after the time for filing a lien has expired as within it, or as it would support the claim attempted by amending in the manner sought after the time for filing.

It is urged that *Slisker v. Schuchert*, 179

Pa. 401, is authority for holding the acts of defendant to be an estoppel, and that *Johnson v. Patton*, 20 Pa. C. C. R. 623, is authority to the effect that where a question of fact is raised which is essential to the legal question as to right to lien, the same will not be stricken off until the fact is determined by a jury.

It certainly is true that had claimants been induced by the request or conduct of the defendant to forego any of their rights, an estoppel would arise against him from asserting a right because of a failure to perform a duty that he had induced the non-performance of, but the evidence lacks much of making out such a case.

There was a request on the part of defendant that claimants file a lien, but no lien was then filed, nor was one ever filed in pursuance of said request, and the testimony of Mr. Lord clearly shows that that request was not only not complied with, but was wholly rejected. Mr. Lord says that when defendant told him five months before the lien was filed that he "had better file a lien," he says, "I told him he (we) had time, that there was no hurry. We had six months to do it in, but that I meant to enter it before that time." The record shows that they did enter it, but shortly prior to the expiration of the time limit, and it would seem clear from the foregoing that the lien was entered, not because of the request of the defendant, but by virtue of the right thereto given by law. Claimants did not agree or consent to file the lien because of said request, and do not even now aver that it was filed pursuant thereto, but having stood on their legal rights, and having made a mistake in enforcing the same, they now say that defendant cannot take advantage thereof because of a request to file the lien. We are not prepared to say that notice would not have been necessary even if the lien had been filed pursuant to said request, in the absence of a waiver of said notice, but no such question is presented for our consideration.

And now, March 25, 1907, the rule to amend is hereby discharged and the rule to strike off is made absolute and the lien is hereby stricken off.

For plaintiff, *Thomas Roddy*.

For defendant, *T. J. Prather*.

[From J. D. Roberts, Esq., Meadville, Pa.]



### Book Review.

SIXTH EDITION OF COLLIER ON BANKRUPTCY. Revised and edited by FRANK B. GILBERT, ESQ., of the Albany, N. Y., BAR. NATHAN BENDER & COMPANY, Publishers, Albany, N. Y. Price, \$6.50.

Collier on Bankruptcy has become a standard work. The new Sixth Edition follows the plan and arrangement of the former ones which have proven to be a practical and exhaustive discussion of the bankruptcy law. Two years have elapsed since the Fifth Edition, and in that time over six hundred cases, involving the interpretation and construction of the act have been decided, all of which are cited under appropriate headings. The eleven hundred pages are taken up with a treatise of the laws and the decisions thereunder; practice as it has been developed since the act became a law; forms and rules in bankruptcy and a general index as well as synopsis at the head of each section, showing the subjects there treated. It is a work which the practitioner engaged in the bankruptcy court will frequently refer to.

A householder who refuses lodging to a person who has come to his house on business, and who is suddenly taken ill, does so at his peril, according to the decision of the Minnesota Supreme Court in *Depue v. Fleteau*, 111 Northwestern Reporter, 1. In this case the guest who was refused lodging was discovered the next morning nearly frozen to death, some distance from his home, and he brought action for damages. Applicable to the facts of the case was held to be the rule that whenever a person is placed in such a position in regard to another that it is obvious that if he does not use due care in his conduct he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation by which he is confronted to avoid danger, and a negligent performance of his duty makes him liable for the consequences.

A rather novel question is discussed in the surrogate's opinion in *Re Pullen's Estate*, 102 New York Supplement, 435. It appeared that decedent had expressed her wish to be buried in her best dress. Those

in charge of the funeral selected one of her gowns for the purpose, and decedent was buried therein. Afterwards it was found that the gown selected had been specifically bequeathed to the wife of the executor. Under the circumstances the surrogate was of the opinion that the legatee should be paid the value of the gown out of the funds of the estate as an item of funeral expenses, and five hundred dollars was allowed for this purpose.

The doctrine that a sole beneficiary of a claim for the death of a person by the act or default of another under Lord Campbell's act has power to execute a valid release notwithstanding that any action for damages must be brought by the decedent's personal representative is reiterated by the Wisconsin Supreme Court in *McKeigue v. Chicago Northwestern Railway Company*, 110 Northwestern Reporter, 384, wherein the court further holds that such release by the beneficiary will bar a subsequent action by the personal representative, if the estate is otherwise sufficient to pay all claims against the same.

A teacher's certificate issued to prosecutrix in a seduction case is, by the Nebraska Supreme Court in *Russell v. State*, 110 Northwestern Reporter, 380, considered incompetent evidence to show the reputation of prosecutrix for chastity. The evidence of the officer who issued the certificate, the court says, was, upon the point of prosecutrix's reputation, of no more importance than that of other witnesses, and ought in like manner to be subject to cross-examination.

A proposed garage designed to accommodate about one hundred and twenty-five automobiles of large type, to be used in part for a repair shop and supplied with a large portable forge, and in which demonstration cars are to be kept, with demonstrators to run them, is a building "offensive to the neighborhood for dwelling houses" within such a restriction contained in a deed. Such is the decision of the Supreme Judicial Court of Massachusetts in *Evans v. Foss*, 80 Northeastern Reporter, 587.

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No. 8.

PITTSBURGH, PA., SEPTEMBER 4, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

LAHEY v. LAHEY et al.

*Evidence—Deceased party—Testimony of adversary—Admissibility.*

Where one party to a transaction is dead the plaintiff cannot by calling the defendant make herself a competent witness, the act only contemplates the calling of the witness by the party representing the deceased.

The fact that the defendant later called the witness to clear up some matters made necessary by plaintiff having been wrongfully allowed to testify does not make plaintiff's former testimony admissible.

No. 1012 January Term, 1907.

Opinion by MILLER, J., specially presiding. Filed May 18, 1907.

The question is, whether the plaintiff's name was forged to a deed, duly acknowledged, purporting to convey her real estate to her husband, now deceased.

The bill alleges that the plaintiff, prior to the 21st of August, 1906, was vested with the title in her own name to a certain lot of ground in the borough of Sewickley; that in November, 1906, she learned that in a fraudulent deed of general warranty, dated August 21, 1906, it appeared that she had conveyed said property to her husband. She avers that she did not execute the deed, nor acknowledge the same; that her signature was affixed by some person unknown to her; that the deed is a forged instrument, and was fraudulently placed on record. She further avers that her husband, who died on the 21st day of September, 1906, by his last will, disposed of said real estate as his property. The prayer of the bill is for cancellation of the deed.

The answer filed by her husband's execu-

tor and his devisees, denies the allegations as to the execution of the deed, averring that she had full knowledge thereof, agreed thereto, and executed the deed in accordance therewith, and that she had full knowledge of the disposition to be made by her husband of his estate, prior to the execution of said deed, the same being a family arrangement.

### FINDINGS OF FACT.

1. John Lahey, plaintiff's husband, lived with her on the real estate described in the bill, located in the borough of Sewickley, Allegheny county, Pennsylvania; the title to this real estate many years ago had been placed in her name; he had children from a former wife; the plaintiff had none, nor had she, in her own language, any "kith or kin." Lahey in addition to his interest in this real estate had other personal estate.

2. Lahey, desiring to make some disposition of his estate, consulted with John J. McAlinney, Esq., a member of this bar, in the presence of the plaintiff, and after both parties were fully advised by the attorney, a family arrangement was agreed upon by which the title to the real estate held by her was to be vested in him, and he was forthwith to devise all his estate to her for life.

3. In pursuance of this arrangement, the deed in question, dated August 21, 1906, and recorded September 21, 1906, appears on its face to have been duly signed, sealed and acknowledged by John Lahey and Mary, his wife, the plaintiff, before John Johnston, a justice of the peace, wherein the plaintiff and her husband conveyed to the latter the entire title to said real estate.

4. Immediately following the apparent execution and acknowledgment of this deed on the——day of August, 1906, Lahey made his will, wherein he bequeathed to his wife (a) all his personal property for life, with what remained thereof to be converted into money after her death, the same to go into a fund for the payment of certain bequests, and (b) to her for life "the property now owned by me situate on Straight street in the borough of Sewickley, Allegheny county, Pa.;" this is the property described in the deed and in plaintiff's bill. Out of the proceeds realized from the sale of

the real estate and any other moneys remaining after the death of the wife, he bequeathed a sum to the priest of his church for masses for himself and for his wife, and after making a few minor bequests to his brother, sister, daughter and grandson, he bequeathed \$1,000 each to his daughter, Anna C. McMasters, and to his granddaughter, Anna Appleton, and made the two latter his residuary devisees. Shortly before he died, his death occurring on the 21st day of September, 1906, he transferred to his wife his money in bank, amounting to about \$900.

5. The plaintiff cannot write; her name on the deed was written by W. J. McMasters, a son-in-law and testator's executor; he also wrote the words "her mark" on the deed; this mark is made of several cross lines of unequal weight; one of the perpendicular lines of this cross-mark is intersected and crossed by the letter "J" in the name "John" in Lahey's signature, appearing immediately on the line below. The cross flow of the ink where the two intersect, clearly shows that the cross-mark was made first; a comparison of John Lahey's signature in the deed and in his will, shows a much wider space between his first and last name in the deed, and that it was necessary to separate his name by a wider space so as to avoid interfering too much with the plaintiff's mark. This corroborates the conclusion that the cross-mark was first made, and it is further strengthened by the positive testimony of McMasters, not denied by Johnston, that the latter instructed her to first execute the deed by making her mark, and when the first mark as made by her appeared faint, instructed her to make it a second time, and the fact is so found.

6. The weight of the competent evidence submitted, establishes the fact that the deed in controversy was executed by the plaintiff, was duly acknowledged and recorded, and the instrument is not fraudulent.

#### CONCLUSIONS OF LAW.

1. The testimony of William J. McMasters, one of the defendants, called in chief by the plaintiff, wherein he testified that she was present and executed the deed, did not thereby render her competent to testify in

chief as to matters occurring before the death of her husband.

2. The testimony of John Johnston denied, while that of William J. McMasters affirmed, Mrs. Lahey's presence and her execution and acknowledgment of the deed; these are plaintiff's two witnesses in chief; the effect of their contradictory testimony was to neutralize her contention.

3. Mrs. Lahey's testimony in rebuttal was competent only as to matters occurring before the death of her husband, after McMasters, the living witness to the execution of the deed, had been called by the defense and had testified as to matters occurring in Lahey's lifetime in her presence. Her testimony so offered in rebuttal as against the deed, which on its face is duly executed, acknowledged and recorded, taken with the responsive answer filed, is not sufficient to sustain the averments of her bill. It must fail because not supported by the evidence of two competent witnesses or the equivalent thereof. It follows that the bill must be dismissed at the cost of the plaintiff.

#### OPINION.

By John Johnston, the plaintiff proved that she was not present and had not signed and acknowledged the deed. Her other two witnesses in chief, Joseph Lahey and Mrs. Egler, establish no fact in support of her contention. The one testified that Lahey on his death-bed had said he had made provision for his wife; the other that he had said that his wife gave him permission to make a will, and that the place was hers; the entire estate to her for life, justified these statements. Her case as to the execution of the deed, so far, depended wholly on the testimony of Mr. Johnston; she being clearly incompetent in the first place, called, under objection, the defendant, McMasters, as her own witness, who testified that she was present and that he saw her sign the deed. He thus contradicted her other witness, Johnston, and as between these two, the vital fact of her signature and acknowledgment stood in *equilibrio*.

Then she was recalled, and under objection was permitted to testify in chief, denying the execution of the deed.

This was clearly error. The living witness under the act of 1891, whose testimony

might have made her competent, must have been called in the interest of and by the party representing the right of the deceased; "the calling of such witness by the adversary could not have been in the contemplation of the legislature." *Cake v. Cake*, 162 Pa. 584. As the court there say, so easy a method of removing the bar of incompetency was never intended. The case thus stood in chief at the close of the plaintiff's testimony, without sufficient competent evidence to support the averments of the bill. The defendant might have moved for its dismissal. Counsel did not make such application, and had a right to assume that the admission of Mrs. Lahey's testimony under their objection, called upon them to answer.

Plaintiff's rebuttal testimony, to be competent, depended upon the condition of things at the time she was called, and she was not made competent by the fact that the other side subsequently called the living witness (*Roth's Estate*, 150 Pa. 261), but assuming that she was competent to testify in rebuttal after McMasters had been voluntarily put upon the stand by the defendants, her testimony wholly fails to make out such a case as would approach granting the relief prayed for. While in rebuttal she made many denials, yet the vital fact of her presence and execution of this deed was not specifically denied.

Not only in view of the responsive answer and the failure to overcome it by the necessary amount of testimony, must her case fall, but the weight of the evidence indicates that she was informed of the entire family arrangement by Mr. McAlinney and of the effect that her deed to her husband and his will in her favor would produce.

While Mr. Johnston testified in chief that he had no recollection of the presence of Mrs. Lahey, attention must be drawn to the detailed statements made by McMasters, to-wit: that Johnston shook hands with Mrs. Lahey when he came to the house; that he opened the deed and after looking it over said that Lahey must sign first; that she got the pen and ink from the mantel in the front room; that he told McMasters to write her name and have her make her mark; that he told her to make the mark strong, which she did; that she then went into the

house for Mr. Lahey's purse, and in the presence of Johnston gave McMasters the money for acknowledging and recording the deed; that the next day, it appearing that Mrs. Lahey had not signed the receipt, Johnston told McMasters to take the deed back to her for that purpose.

Mr. Johnston was in court during the whole time of this trial and was not recalled to rebut any of these distinct averments. The plaintiff in answer to this suggestion argued that as Johnston denied in chief Mrs. Lahey's presence, it was not necessary to recall him in rebuttal as to any of the specific statements made by McMasters. This does not follow. It must be borne in mind that Mr. Johnston is nearly eighty-one years of age and recently recovered from a severe illness. Had he been recalled and his attention drawn to the various statements made by McMasters, it does not follow that his recollection might not have been refreshed, and that some of the incidents might not have been recalled. Failing to call him at all, establishes the fact of McMasters' uncontradicted, detailed statements, and they are of great weight.

The inherent probabilities underlying this transaction, it seems to us, are with the defendant; that the family arrangement was discussed fully, is not denied; that the disposition of this property to Lahey's own kin should be desired by him, is not unreasonable, after having made full provision for his wife, especially in view of the absence of kith or kin by her; that John Lahey should have executed his will asserting that he owned this real estate, is to be presumed to have been based upon fact.

Fraud cannot be presumed, much less can it be found as a fact, in the absence of clear and competent proof.

For plaintiff, *Hermann L. Hegner*.

For defendant, *John J. McAlinney* and *Leonard K. Guiler*.

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A passenger who, while traveling on a rapidly moving railroad car, intentionally and needlessly projects his arm, or a part thereof, out of the window of the car, is held, in *Interurban R. & T. Co. v. Hancock* (Ohio) 6 L.R.A. (N.S.) 997, to be guilty of negligence, as matter of law.

**Circuit Court, United States,**  
**WESTERN DISTRICT OF PENNA.**

**HARTON v. HOWLEY, et al.**

*United States Courts—Adverse citizenship—Plea to the jurisdiction.*

Where plaintiff bases his right to sue in the United States Courts on the ground of adverse citizenship because of removal from the state, which is denied by the defendant, it must be shown that there was an actual removal and change of domicile with a bona fide intention of abandoning the former place of residence and establishing a new one and the acts of the party must correspond with such purpose.

No. 20 May Term, 1907.

Opinion by EWING, J. Filed August 3, 1907.

In the bill filed in this case the plaintiff claims to be a citizen of the state of Ohio and alleges the defendants are citizens of the state of Pennsylvania and to that bill Frank P. Howley has filed a plea to the jurisdiction, stating therein that the plaintiff, as well as the defendants, is a citizen and resident of the state of Pennsylvania, and also that another action between the same parties for the same subject matter had previously been instituted and is still pending undetermined in the state courts of Pennsylvania.

This ground of objection to the jurisdiction of this court may be disposed of first. It has been repeatedly determined that the pendency of another action between the same parties for the same cause or causes in the state courts is no bar to a similar action in the courts of the United States, as they are regarded as foreign courts for that purpose.

Upon the question of citizenship considerable testimony has been taken, which may be briefly summarized as follows. The plaintiff was born and raised in Beaver county, Pennsylvania, and while for a time prior to his marriage he resided in another state, from his marriage in 1889 up to March, 1905, it is admitted his residence was in Beaver, Beaver county, Pennsylvania.

Up to about the latter date he was engaged in the building and contracting busi-

ness, but then became interested in the Old Colony Oil Company and the Shawnee Oil Corporation, the former now conducting a contracting business in the line of drilling wells, and the latter an oil producing company. Of both these companies the plaintiff is superintendent and manager, and the prosecution of his work for the former company naturally requires him to spend most of his time where their work lies and for the latter company he has charge of their leases, which embrace territory in Western Pennsylvania, Eastern Ohio and in West Virginia.

Plaintiff's family consists of himself, wife and one son, now grown and in employment. In March, 1905, he claims to have left Beaver and resided until the spring of 1906 in the western part of that county back of East Liverpool, in the neighborhood of Smith's Ferry, and since March, 1906, he alleges that his residence has been East Liverpool, Ohio.

He says his work during that period and for some time to come has been and will be in the neighborhood of East Liverpool, within a distance of some six miles and that that is the most convenient point for him to his business.

In East Liverpool he has quarters in a lodging house known as the Hotel Hollenden, occupying there a room on the third floor, which he uses both for his bedroom and his office. He takes his meals wherever he happens to be. That hotel furnishes no meals. During the time he has been at East Liverpool and in the neighborhood of Smith's Ferry his family has continued to reside in the town of Beaver, where his mother also resides. In the fall of 1905, through negotiations conducted by himself, his wife purchased a lot in Beaver and subsequently erected thereon a dwelling house, completing it in the late summer or early fall of 1906, which she and her son have since occupied as their home. There is no disagreement or lack of harmony in the family and no separation of husband and wife. The plaintiff states that he hopes before long to be able to have his family with him in East Liverpool, and that so long ago as last fall he spoke to a real estate dealer in Beaver about trying to sell his

wife's property there. He accounts for his wife and son remaining there by stating that his son is in employment there, or in that neighborhood, and that his wife stays there in order that he may live at home with her, as well as because of their ownership of that property.

The plaintiff's name appears in the local directory of Beaver as a resident of that place, and he is also registered as a voter and assessed for taxation there, both for the years 1906 and 1907, and he admits he voted there in the fall of 1905, the time he was staying near Smith's Ferry. He spends practically all of the week except Sunday in and about East Liverpool and his room there is rented by the month. Sundays he generally spends with his family in Beaver.

He has never exercised any of the rights nor borne any of the burdens of citizenship in East Liverpool, admitting that he has not paid any taxes there and claiming that he has not voted there because the laws of Ohio require two years residence.

He states it is his intention to remain in East Liverpool so long as his business pays him as well as it does now, but admits his position would require him to go any place where the work of the corporations by which he is employed would demand. These corporations have their offices in Beaver and both the plaintiff and his wife have some interest in one or both of them.

The character of the work in which the plaintiff is engaged is such as to make it very uncertain as to where he will be at any particular time in the future, and the probability is that, like all others following similar vocations, he will be going about from place to place remaining not very long and for no definite time in any one locality.

East Liverpool is about 17 miles distant from Beaver, with rail communication, and the plaintiff pays \$16 per month for his room at the former place.

The question for determination then is whether the plaintiff is a resident of Ohio or Pennsylvania, and under the pleadings in the case the burden of showing that he is not a resident of the former state rests upon the defendant.

"To effect a change of citizenship from one state to another there must be an actual

removal, an actual change of domicile, with a bona fide intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose." *Kemna v. Brockhaus et al.*, 5 Fed. Rep. 762.

"Domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin." *Price v. Price*, 156 Pa. 617.

Applying these principles to the case in hand, and having regard to the employment of the plaintiff, the situation of his family and all the facts and circumstances surrounding his and their acts during the past two years, I am impressed with the conviction that his real residence and citizenship are in Pennsylvania and that his situation is rather that of one who purposes eventually, if family circumstances will permit and his employment so dictates, to change his place of residence permanently, rather than that of one who has already done so.

The conclusion, therefore, is that the plaintiff is a citizen of Pennsylvania, of which state both the defendants are citizens, and that therefore the plea of the defendant Howley must be sustained and the case dismissed for lack of jurisdiction.

For plaintiff, *Geo. C. Bradshaw*.

For defendants, *T. B. Alcorn and R. B. Petty*.

## Court of Common Pleas,

CLEARFIELD COUNTY.

**PROUTY v. MARSHALL, Defendant,  
and LaRUE, Terre-Tenant.**

*Recording acts—When instrument is recorded.*

*Mistake of recorder.*

An instrument is recorded as soon as it is filed for record, and subsequent purchasers will be charged with constructive notice notwithstanding the recorder does not record the instrument on the record book or fails to record it at all.

No. 115 September Term, 1906. Sur motion by defendant for judgment on the reserved question.

Opinion by SMITH, P. J. Filed March 6, 1907.

At the trial of this case we reserved the legal question involved in the point of the defendant as follows: "That under the law and the evidence, the verdict must be for the defendant, A. A. LaRue." This mortgage was duly signed and acknowledged by L. J. Marshall. The recorder, on the back of said mortgage, under date of February 6, 1900, certifies that it was recorded in mortgage book 7, page 421, etc. In transcribing the same, however, the first letter of Marshall's name is written "S" instead of "L" throughout the mortgage and is so indexed. From this it is argued in favor of the terretenant, who purchased the property from L. J. Marshall, that there is no record of a mortgage against L. J. Marshall and that therefore he took the property free and discharged from the lien thereof.

Our recording act of March 18, 1775, section 6, 1st Smith's Laws 424, says: "Every recorder of deeds in this province shall keep a fair book in which he shall immediately make an entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties and the place wherein the lands, tenements or hereditaments granted or conveyed by the said deed or writing are situate, dating the same entry on the day in which said deed or writing was brought into his office, and shall record all such deeds and writings in regular succession, according to their priority of time in being brought into the same office; and shall also immediately give a receipt to the person bringing such deed or writing to be recorded, bearing date on the same day with the entry, containing the abstract aforesaid; for which entry and receipt he shall take or receive no fee or reward whatever." Following which, in the same section, is the penalty for neglect of such duties.

Following this was the act of March 28, 1820, section 1, 7 Smith's Laws 303, as follows: "All mortgages, or defeasible deeds in the nature of mortgages, made or to be made or executed for any lands, tenements or hereditaments within this commonwealth, shall have priority according to the date of recording the same, without regard to the time of making or executing such deed; and

it shall be the duty of the recorder to endorse the time upon the mortgages or defeasible deeds when left for record, and to number the same according to the time when they are left for record, and if two or more left upon the same day, they shall have priority according to the time they are left at the office for recording; and no mortgage or defeasible deed in the nature of a mortgage, shall be a lien; until such mortgage or defeasible deed shall have been recorded, or left for record as aforesaid: provided, that no mortgage given for the purchase-money of the land so mortgaged shall be effected by the passage of this act if the same be recorded within sixty days from the execution thereof."

Under these acts it has been repeatedly held in Pennsylvania, that when an instrument to be recorded is left for record with the recorder for that purpose, it is to be regarded as actually recorded from that time, whether it was in fact recorded in a wrong book or actually recorded at that time or at subsequent time. The question first arose in cases where the recorder transcribed or recorded the instrument in a different book from that which would be indicated by the instrument itself. Thus, in 1879, in *Gladen v. Frick*, 88 Pa. 406, the Supreme Court overruled *Luch's Ap.*, 44 Pa. 519, and held that where certain instruments of writing are not required by law to be recorded in a particular book, they may be recorded in any book kept by the recorder. This was followed by *Paige v. Wheeler*, 92 Pa. 282, where it was decided that a defeasance was properly recorded in any book kept by the recorder of deeds. It was also followed in *Clader v. Thomas*, 89 Pa. 343, where a deed was recorded in the miscellaneous book.

After the passage of the act of March 19, 1875, section 1, P. L. 32, requiring certain general indexes, both for deeds and mortgages, to be kept by the recorder, it was contended that the rule governing *Gladen v. Frick* and *Clader v. Thomas*, supra, was changed, but Justice Green, in *Stockwell v. McHenry*, 107 Pa. 237, ruled otherwise. So also in *Shebel v. Bryden*, 114 Pa. 147, where a deed of assignment was first indexed in the limited partnership docket and not in the deed book index, it was held not to in-

validate the recording of the instrument. The court then reiterated, "In contemplation of law it was recorded and took effect from the time it was left with the recorder for the purpose of being duly recorded."

Citing *Gladen v. Frick*; *Clader v. Thomas*; *Paige v. Wheeler*, supra; and *Mark's Ap.*, 85 Pa. 231. In *Farabee v. Joseph McKerrihan*, 172 Pa. 234, a mortgage was left for record to be recorded, but was actually recorded in the deed book and indexed in the index of deeds. Justice Green again reviews the cases herein cited and reiterates the general principle, "that when the holder of an instrument to be recorded has left it with the recorder to be recorded, it is to be regarded as actually recorded from that time, whether it was actually recorded at that time or not, or whether it was recorded in the wrong book." He also discusses in that opinion the effect of the act of March 18, 1875, relating to mortgage indexes referred to, and holds that said act did not create any new rule of constructive notice respecting mortgages, for the reason that it did not purport to repeal any of the prior legislation of the state, nor that it was inconsistent with any such legislation. His argument is that the act of March 28, 1820, supra, which provided that mortgages are liens from the time they are recorded or left for record controls, and that if the act of March 18, 1875, was given the effect contended for, it would destroy that part of the act of 1820 which gives the same effect to being left for record as to being actually recorded.

This seems to be the principle of law laid down by a majority of the states where, as in this state, the statutes are to the effect that an instrument is recorded or takes effect from the time it is actually filed for record. The majority rule, as indicated in *Amer. & Eng. Encyc. of Law*, Vol. 24, page 114, is thus stated: "Where this is the law (that is, where statutes exist), the rule is favored by what seems to be the weight of authority that, when the grantee had duly deposited for record a valid instrument at the proper time, in the proper office and with the proper officer, he has performed his whole duty, and subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not properly spread

the instrument on the record book or fails to record it at all," and cites in support thereof all of the Pennsylvania cases herein cited, together with cases in the United States courts, and from sixteen states other than Pennsylvania.

Applying these principles to the case in hand, was this mortgage, unquestionably signed and acknowledged by L. J. Marshall, actually recorded when left for record by the plaintiff, Agnes Prouty, or her attorney, on February 6, 1900, as shown by the certificates of the recorder. We are of opinion that it must be held that it was so recorded and that A. A. LaRue, the purchaser from L. J. Marshall, is affected with notice of that record. The error in transcribing "S" for "L" in the first initial of the mortgage is the error of the recorder's office. As is held in some of the opinions, there can be no duty devolving upon the holder of an instrument to stand over the recorder and see that such instrument is either actually recorded at all, properly recorded or recorded in the proper book. The writing of the scrivener of this mortgage undoubtedly misled the recorder. The "L" in the name of L. J. Marshall in several places in the mortgage itself could easily have been mistaken for "S," but the signature of L. J. Marshall, as also the acknowledgment in the handwriting of the notary public, is just as unquestionably an "L" and should have put the recorder upon inquiry as to whether he was properly recording it. We hold, as a matter of law, that it is the mortgage of L. J. Marshall to plaintiff; that it was properly recorded, as shown by the certificate of the recorder, on February 6, 1900; and that as a consequence it is a valid lien upon the property in question and constituted constructive notice to A. A. LaRue when he purchased the property.

The motion for judgment for the defendant *non obstante veredicto* on the reserved question is therefore overruled, and judgment is directed to be entered in favor of the plaintiff for the amount of verdict, upon payment of the jury fee. Exception noted to the defendant, A. A. LaRue, and bill sealed.

For plaintiff, *Pentz & Caulkins*.

For defendant, *A. L. Cole*.

[From Oscar Mitchell, Esq., Clearfield, Pa.]



## Court of Common Pleas,

BLAIR COUNTY.

### McFADDEN v. CONDRON.

*Dower—Assignment for creditors—Widow's rights.*

An assignment for creditors not joined in by the wife of the assignor does not defeat the wife's rights to her common law dower.

No. 575, equity docket "D." Bill in equity.

Opinion by SHULL, P. J., specially presiding. Filed February 21, 1907.

The plaintiff is seeking to recover her rights of dower as widow in certain lands of which her husband was seized during coverture, but which he assigned for the benefit of his creditors, without his wife, this claimant, then joining in said deed.

#### FINDINGS OF FACT.

1. Barbara McFadden, plaintiff and claimant, was the actual wife of Archibald McFadden at the time of his decease, which occurred on September 14, 1887;

2. Archibald McFadden, husband of claimant, in his lifetime and during coverture with plaintiff, was seized in his demesne as of fee of a certain lot of ground situate in the borough of Hollidaysburg, Pa., bounded by Young's alley, lands of Daniel Young, Gilbert Fagley and the canal basin, being about two hundred and forty-seven feet in length and fifty-six feet wide, and which is more fully described in the deed, dated June 23, 1869, from Joshua Gilbert and wife to Archibald McFadden, as recorded in deed book, Vol. W, page 645.

3. Archibald McFadden made a deed of voluntary assignment for the benefit of his creditors, to A. S. Morrow, which said assignment included, inter alia, the above described plot of ground. But his wife, the claimant, did not join in said deed;

4. A. S. Morrow having died before executing fully the trust, John M. Snyder, Esq., was appointed to execute the same, who, under an order of court, sold the lot herein described to Joseph B. Condron, this respondent, which said sale was duly confirmed and deed made and delivered in accordance with said sale, and the purchaser,

this respondent, is in possession thereof;

5. That no proceedings up to the present time have ever been instituted to establish and fix the dower rights of the widow in the said premises, nor has any dower ever been paid by this respondent, or any one for him, to the complainant.

#### DISCUSSION.

The plaintiff's husband became seized of the undivided one-half of the premises by virtue of a deed of conveyance from Joshua Gilbert and wife, et al., on June 23, 1869, which said deed is recorded in deed book, Vol. W, page 645, and upon the same deed of conveyance on same date, but unrecorded, is an assignment and conveyance from W. C. Enright and wife of the other undivided one-half of said premises, which places the title absolute in Archibald McFadden, who was seized and owned the said plot of land during coverture with Barbara McFadden, this plaintiff.

The premises is a low, marshy lot, lying along the canal basis, is unimproved, there being no buildings thereon, and has yielded but little revenues, in fact not sufficient to pay the taxes, since it came into possession of defendant. He undertook to derive some revenues therefrom by moving a shanty or dwelling thereon for rental, but the evidence discloses the fact that the venture proved a failure, the expense being greater than the income. Besides these facts, the defendant tenders plea *tout temps prist*, which bars the right of plaintiff to recover mesne profits, unless it is shown by the evidence that dower had previously been demanded. No such evidence was adduced. At this time the plot has become valuable, because it is necessary for the use and operations of the railroad company, and there now offered, and a contract of sale made and entered into with the company by the defendant in consideration of the sum of \$1,000. This, therefore, is deemed to be the true present value of the premises, or the value at time the widow became dowable together with the increase arising from advanced values of the premises inherent in the land itself. *Thompson v. Morrow*, 5 S. & R. 289.

There being no improvements upon these premises nor has there been much improvements whereby the value of the lot would

be enhanced since in possession of vendee, hence, it is not necessary for us to discuss the proposition that the widow is not entitled to increase in value occasioned by the vendee's improvements. *Thompson v. Morrow*, supra. The other causes conducive to the increase is her gain and she is entitled thereto. Hence, there is no question as to the value of the premises and none other is shown by the testimony, except the amount fixed by the agreement for the sale. Under the statute (act of April 8, 1833, section 1, P. L. 315) it is provided that "the real estate of a decedent \* \* \* remaining after payment of all just debts and legal charges, which shall not have been disposed of by will, or withwise limited by marriage settlement, shall be divided and enjoyed as follows:

"1. Where such intestate shall leave a widow and issue, the widow shall be entitled to one-third part of the real estate for the term of her life." It appears, under our third finding of fact, that Archibald McFadden conveyed and assigned for the benefit of creditors, his right, title and interest in said lands, he, therefore, having "disposed of" said real estate in his lifetime and not having died seized thereof, his widow would not be entitled to dower under the statute. But this deprivation of her statutory dower does not extend to bar her rights of dower at common law. The deed of assignment fixed the quantum of estate which passed to the assignee, and the assignee could see under an order of sale only such estate and title as passed to him by the deed of trust. The wife's contingent right of dower could not pass from her without her joining in the deed, which would convey such right, and not having so joined, there is left in her the right of dower in the lands of which he was seized during coverture, and which at his decease immediately matured into being. *Mills v. Ritter*, 197 Pa. 353. The right of this plaintiff, therefore, in the premises, is that of common law dower, which entitles her to assignment by metes and bounds. But the evidence discloses the fact that the lands cannot be divided without prejudice to or spoiling the whole thereof, we, therefore, owing to inability to divide, appraise the same, fixing

said value at the sum of \$1,000 as heretofore suggested.

#### CONCLUSIONS OF LAW.

1. That the plaintiff is entitled to dower at common law in the premises described in the bill.
2. That said lands cannot be divided to set apart to the widow her rights in metes and bounds, and the lands are, therefore, appraised and valued at the sum of \$1,000.
3. That it was necessary to fix such dower by some legal process, either by partition or in equity, and it never having been so done, the costs of this proceeding should be deducted from the value of the whole lands, and one-third of the balance remain as a charge on said lands; the interest on said one-third of the balance shall be paid annually to Barbara McFadden.

And now, February 21, this cause came on to be heard, testimony was adduced, the case argued, and upon consideration, it is ordered, adjudged and decreed that the costs of this proceeding be deducted from the entire sum or value of the premises and the dower interest of one third the balance be therein fixed, to wit, the sum of \$19.33, which said amount shall be paid by the said defendant or his successors in title, on May 1, 1907, and the further sum of \$19.33 annually thereafter to the said Barbara McFadden during the term of her natural life. The prothonotary to enter decree nisi, notify counsel hereof, and if no exceptions, in ten days decree absolute.

For plaintiff, *E. G. Brotherlin*.

For defendant, *Robert W. Smith*.

[From Levi Leedom, Esq., Hollidaysburg, Pa.]

#### Defamation in Lawsuits.

A sharpe lesson was taught by the Court of Appeals of New York a few days since, according to a newspaper report of the matter, to an attorney who is himself a judge of a lower court. The account of the matter states that the attorney's brief gratuitously accused the parties on the other side with pilfering an estate, and that the opposing counsel called the attention of the Court of Appeals to this part of the brief, and suggested that it was not substantiated by any proof. After the attention of the court was

directed to the matter, the judges carefully read the passage, and then the presiding judge deliberately directed the offending attorney to take his seat at the table, and with his pen eliminate from the brief every word of the attack made on the reputation of the parties to the action, and, further, to eliminate such matter from every copy of the brief that had been submitted to the court. The attorney protested that there were sixteen or eighteen of these copies, and that the court would not expect him to scratch the passage out of them all, but in reply the judge merely said, "Do as the court directs," while an associate judge leaned forward and expressed his wish to contribute an assenting opinion to this order. This incident is taken from a newspaper report of the transaction, but, assuming its truth, it is a very gratifying instance of deserved rebuke to a gross offense. Courts have not always been so vigorous in their treatment of similar cases.

The pettifoggers and the shysters who infest some of the lower courts have always been much given to a personal abuse of the opposing attorney's parties and witnesses. No doubt their breed is rapidly becoming extinct. But, even among those who regard themselves as honorable members of the legal profession, there have always been some who were dishonorable enough to make violent, outrageous and unjust attacks on those who opposed them, in the hope of getting an advantage in their suits. Such practices succeed best with juries of the lowest grade. Doubtless defamation in lawsuits has been for the most part confined to oral argument before juries. Attorneys willing to exhibit themselves both as liars and as cowards have taken advantage of the shield of privilege to utter libels or slanders in lawsuits which they would not dare to repeat out of court. As intelligence, decency, and a sense of justice become common in a community, unjust abuse uttered by an attorney in a case recoils upon himself and damages his case, though it must be confessed that here and there a man is found who has achieved much success at the bar who has a reputation for brutal and unscrupulous treatment of those opposed to him.

The legal privilege of an attorney for defamation in the course of a suit is not absolute, though many appear to think it so. The case of *Randall v. Hamilton*, 45 La. Ann. 1184, 22 L.R.A. 649, 14 So. 73, and other cases reviewed in a note to that case in 22 L.R.A. 649, sustain the proposition that defamation in a pleading is not privileged, unless the defamatory matter is pertinent or relevant to the case. The same doctrine is upheld in *Grant v. Haynes*, 105 La. 304, 54 L.R.A. 930, 29 So. 708. The same in substance is established with respect to defamatory testimony. *Cooper v. Phipps*, 24 Or. 367, 22 L.R.A. 836, 33 Pac. 985, and other cases cited in the annotation to that case in 22 L.R.A. 836. But, while the privilege in such cases is not unlimited, it is so nearly so that an attempt to get legal satisfaction for defamation in a lawsuit is rarely made. It is therefore all the more important that the court should, in every instance where possible, administer severe and drastic treatment to any attorney who wantonly and gratuitously attacks the character of another person.—*Case and Comment.*

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The right of a conductor to eject a passenger from a car when the station to which his ticket reads is passed, and he refuses to pay additional fare, is sustained in *Virginia & S. W. R. Co. v. Hill* (Va.) 6 L.R.A. (N.S.) 899, notwithstanding his contract calls for a ticket to a more distant point, and the ticket held by him was issued by mistake.

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Refusal of a connecting carrier to surrender freight—at least after a reasonable time to ascertain facts—upon tender of the rate stipulated for in the carriage contract, which is in excess of its own portion of the through rate, because of a way bill in its possession calling for a larger sum, which is subsequently admitted to be a mistake, is held, in *Beasley v. Baltimore & P. R. Co.* (App. D. C.) 6 L. R. A. (N. S.) 1048, to be a conversion for which trover will lie.

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The validity of a statute prohibiting the use of the national flag for advertising purposes is sustained in *Halter v. State* (Neb.) 7 L.R.A. (N.S.) 1079.

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No. 9.

PITTSBURGH, PA., SEPTEMBER 11, 1907.

## Orphans' Court, ALLEGHENY COUNTY.

### In re Estate of WM. G. FOSTER, Deceased.

#### Testator—Partnership interest—Continuance of.

Testator was a member of a partnership, the terms of which provided that the death of a member should not dissolve it: that in case of death, failure or withdrawal of a member the remaining partners should have the right to purchase his interest, and in case of death of a member his legal representatives could hold his interest and could withdraw from the firm in the manner provided for a withdrawing member. By testator's will his estate, including this partnership interest, was put in trust for a period of five years and then it was to be divided among the beneficiaries. At the expiration of this time the remaining partners sought to purchase the testator's interest in the manner provided in the partnership agreement. Held, that testator's will was not a direction to his executors to sever his interest in the partnership, and under the terms of the agreement the beneficiaries under the will were entitled to hold their interest therein.

No. 165 June Term, 1907.

Opinion by MILLER, J. Filed July 23, 1907.

The question is, whether a co-partnership agreement which provides that death shall not terminate the decedent's interest therein, entitles the surviving partners to his interest at a book value fixed for withdrawing or failing members, the deceased partner's beneficiaries declining to withdraw.

#### THE FACTS.

In 1871 the decedent and William Stevenson, under the name of Stevenson & Foster, formed a partnership for the purpose of job printing, blank book manufacture, etc., in the city of Pittsburgh; no written articles of

co-partnership at that time seem to have been made. In 1888 they entered into an agreement in writing, the main provision of which is that the death of either partner should not dissolve the firm; but that the business should be continued, and providing the manner of said continuance. In 1893 the name was changed to Stevenson & Foster Company, and Alexander S. Calhoun, Joseph O. Wells and Bertram S. Smith were admitted as partners, they formerly having been employes of the firm. In this agreement it was provided, *inter alia*, that the capital stock was \$200,000, of which \$120,000 was agreed upon as the value of the good will; after defining the respective interests of each of the parties and the salaries that shall be paid, article seventh of the agreement provided that "the firm shall not be dissolved by the withdrawal, misfortune, failure, pleasure, or death of any of its members, nor in any way but by the consent of all the members thereof, except as hereinafter provided in these articles." Section eight provided that "if any partner desires to withdraw, or should any one's interest become divested by legal process, or by assignment for the benefit of creditors, the remaining members should have the right to take such interest at the price or value found upon the books of the firm at the last annual taking of stock." Section nine provided that "in the case of the death of any member his legal representatives shall hold his property and interest in the same manner and subject to the same rights and liabilities as the deceased member held the same, and *may* withdraw from the firm as provided in the case of the withdrawal of a member;" in this section the term "legal representatives" was defined to be the person or persons who may be made such touching the property by the last will of the deceased member, or who may become such under the intestate laws of Pennsylvania, and included executors, administrators, guardians, trustees or legatees, if *sui juris*. This agreement was amended under date of December 11, 1895, providing that "the legal representatives of any deceased member of said co-partnership may designate a suitable person, as they can with the surviving members of the co-partnership

agree upon, to represent the interest of such deceased member in the working force and active management and conduct of the business. And such representative person or appointee shall be admitted thereto, and shall be paid such salary as shall be determined by the members or persons representing a majority of the contributing capital."

The business was conducted under the foregoing articles until the 15th of February, 1901, when William Stevenson died testate, providing in his will, *inter alia*, that his interest in the co-partnership of the Stevenson & Foster Company "should be allowed to remain until after the death of three of my said executrices hereinafter named, except for good and substantial reasons." The will further bequeathed all his estate, including his interest in this co-partnership, to his wife and his three daughters as executrices in trust, which trust is clearly defined.

New articles of association were then entered into on the 1st day of July, 1901, between William G. Foster with the other existing members of the firm, and with George R. Dorman, Edwin L. Stevenson and Alan C. Stevenson as new partners, and with the executrices of William Stevenson, respecting his interest, save an interest of 2-40 which was purchased by Edwin L. Stevenson and Alan C. Stevenson. This agreement recited the articles of co-partnership of July, 1893, and the supplementary agreement of December 11, 1895, and after reciting some of the provisions relating to the continuance of the partnership, notwithstanding the death of a member, and the provision of William Stevenson's will, and the admission of new interests provided as follows: (1) The partnership was to continue until dissolved by the mutual consent of all the parties, or as provided for in the new agreement; (2) That the property of the firm should be valued at \$80,000, defining the respective interests of each partner, and in which (3) it appears that the value of William G. Foster's interest was \$26,000; (6) That none of the parties thereto should without the consent of all the others regularly obtained, dispose of any interest to any person other than to a

member of the firm, and then only as provided in paragraph eight. The remaining paragraphs bearing upon the questions at issue, in part, are as follows:

"7. In order to provide against loss and inconvenience that might otherwise result from the withdrawal of members, or the misfortune, failure or death of any of the partners, it is hereby agreed as follows: The firm shall not be dissolved by the withdrawal of any of its members or parties hereto or by the misfortune, failure or death of any of its members thereof and parties hereto, except as hereinafter provided. And in case of the death of any or all of the parties of the second part, the survivor or survivors or successor or successors shall represent said interest."

"8. Should any of the members or parties hereto desire to withdraw from the firm or should the interest of any member become divested through legal process, or by assignment for the benefit of creditors, it is hereby agreed that the remaining members shall have the right to take the interest of such retiring or failing, or unfortunate member at the price or value at which the same stands upon the books of the firm at the last annual taking of the stock (as hereinafter provided) to which shall be added the proportion of the profits or deducted the share of losses for the current business year, proportionately upon the basis of the contributing capital."

"9. In the case of the death of any member his legal representatives shall hold his property and interest in the same manner and subject to the same rights and liabilities as the deceased member held the same, and may withdraw from the firm as provided in the case of the withdrawal of a member."

"10. Remaining members as used in these articles is understood to embrace the legal representatives of such members as are or may be deceased, and who have been admitted to participate in the transactions of the firm."

William G. Foster died on the 13th day of June, A. D. 1902, having made his last will and testament, dated March 22, 1900, at which time the business of Stevenson & Foster Company was operated under the previous articles with their supplements. By his will he provided *inter alia*, as follows:

"Third. All the rest and residue of my estate real, personal and mixed and wherever situated, I give, devise and bequeath unto the Equitable Trust Company of Pittsburgh, Pennsylvania, my executor hereinafter named, in trust for the following uses and purposes, viz:

1st. After the full payment and discharge of my just debts and engagements and funeral expenses, to take, hold, receive, manage and control all of my said estate in such manner as to my executor may seem best.

2nd. Providing for the payment of certain portions of the income from his interest to his wife, children and niece, for a period of five years from his death unless his executor sooner makes division.

3rd. Directing the trustee to collect the income from his estate, invest and reinvest the same, and to hold the unexpended income and the principal and all of his estate in ten undivided shares, defining what shares respectively shall go to his wife, children and other beneficiaries; further providing as follows: 'At the expiration of the term of five years from my death or sooner if my said executor sees fit, my executor shall divide the whole estate and after payment of the reasonable expenses of the trust shall pay, fix and set apart unto my said wife her said four shares, unto my daughter Emma Kate Foster her said three shares, and unto my son Charles W. Foster his said one share, all to be free from the trust.'

He then arranges for the continuance of the share of his son, William G Foster, in a trust to the end of his life, and for the share to his niece, Helen Harrison, to remain in the trust until she is twenty-five years of age.

By the fourth paragraph of his will he authorizes his executors to sell, barter, exchange and dispose of any and all of his property at any time until his estate was divided up and set apart as set forth in the third paragraph, giving the executor full power as to manner of such sale, barter, exchange, or disposition of his property.

William G. Foster, Jr., testator's son, and a beneficiary under his will and for whom a trust was created, died in October, 1904, unmarried and without issue. His other son, Charles F. Foster, whose share was to be free from the trust at the expiration of five years, died August 25, 1905, testate.

After the death of William G. Foster, by agreement between his executor, beneficiaries and the surviving parties, J. D. Lyon, Esq., was appointed to represent the interest of the Foster estate in this co-partnership. The net earnings of the firm ending with the year 1903 were \$60,949.76; for the year 1904, \$59,857.10; for the year 1905, \$62,429.14; for the year 1906, \$53,154.07.

These earnings are exclusive of salaries paid, which since 1904 have aggregated \$27,820 a year. The dividends paid during the years 1904, 1905 and 1906 having been \$60,000, while for the year 1903 it was \$100,000.

The surviving partners, shortly after the death of Mr. Foster and continually since that time, have given notice of their intention to acquire his interest at the expiration of the five-year period from his death, as provided by his will, in accordance with the terms of the last partnership agreement. This interest as shown by the books is \$39,127.48, which amount was tendered to the executor at the expiration of the five year period, but was refused. The executor accounts for the undivided interest in this firm, to-wit: 26-80 at the appraised valuation of \$75,000, and reports the same into court as a balance in favor of the estate in said co-partnership.

Neither the executor nor the beneficiaries under the will of William G. Foster, deceased, desire to have his interest in said co-partnership cease; but insist upon having the same remain for the benefit of the estate, said interest to be represented in said firm as may hereafter be determined upon. They further deny that the amount tendered by the surviving partners is the fair value of the decedent's interest in said partnership, and deny that they are bound by the terms of the agreement as to withdrawal members respecting the said interests.

The good will, trade name and earning power of the Stevenson & Foster Company are assets and are of value.

#### OPINION.

It is manifest that under articles seven and nine of the agreement of July 1, 1901, the death of a partner did not dissolve the firm; but his legal representatives were to hold his interest therein as did the decedent himself. If the representatives of the deceased member *desire* they *may* withdraw from the firm as provided in the case of the withdrawal of a member who did so voluntarily, or who was under legal liability, in which case his rights, or the rights of his creditors, were fixed by article eight.

The term "legal representatives" is a very comprehensive one; it embraces not only executors and administrators, but also in-

cludes descendants, next of kin and distributees: *Staples v. Lewis*, 41 Alt. Rep. 815; *Warnecke v. Lembca*, 71 Ill. 91; *Commonwealth v. Bryan*, 6 S. & R. 83; *Jarman on Wills*, Sixth Edition, Vol. 2, page 117. The parties to the agreement of July, 1893, and its supplement in 1895, defined legal representatives to include more than executors, and this definition is properly read into the agreement of 1901, which refers to the two preceding ones.

But the representatives of the Foster estate do not wish to withdraw from the firm. There is nothing in the agreement which compels them to withdraw. There is a vast difference between the rights of a voluntarily withdrawing, failing or unfortunate member, and the rights of the representatives of a deceased member, who may continue to hold his interest therein and who elects not to withdraw or sever the deceased member's interest therefrom. The agreement of 1901 is careful and discriminates between the interest of one who is dead, and the rights which his estate shall have in the firm, as compared with the interest of one who voluntarily withdraws, or whose share therein is subject to execution.

The relation of the parties and their rights are fixed by the contract of 1901, and unless there is a dissolution worked by the terms of Foster's will, the petitioners have no standing.

He directs that his entire estate, including his interest in the partnership, shall go into the possession of the Equitable Trust Company, in trust, for the period of five years; it to manage, control and direct the same. He then directs that his estate shall be divided by the executor among the beneficiaries. This works neither a general distribution involving a conversion of his partnership interests, nor is it a direction to sever his partnership interests in the firm, nor is it any express or implied authority for assuming that he intended his interest therein to be fixed at the book value as prescribed for voluntarily withdrawing members.

The fact that he did not specifically mention or devise his interest in the firm, indicates that he knew and intended that his estate was to be benefited by the terms of

the contract, providing that his death worked no dissolution, and that his interests for his beneficiaries remain the same as though he were living; such provision is binding: *Brew v. Hastings*, 196 Pa. 222. The executor has filed this account for the purpose of making the division as directed, and as a part of the balance he reports the decedent's interest in the firm at an appraised value of \$75,000. The beneficiaries have the right, creditors not being affected, to elect to take this interest in kind, and as the personal representatives, with and succeeding the executor, they have the right to hold this interest as provided in article nine, to-wit: in the same manner and subject to the same rights and liabilities as the deceased member held the same. There is no difficulty in making such division; the will provides the proportions.

It is urged that this will introduce a number of new partners; such may be the effect of the contract. Foster's will did not and could not change this contract. If serious complications arise between the parties hereafter, it is not the concern of this court at this time.

There seemed to be no difficulty in fixing the interests of the Stevenson estate after his death, and a satisfactory agreement preserving the joint property was made. Why can not this be done again as to the Foster interest? If the parties cannot agree and are dissatisfied, the contract provides for the means of winding up the entire business with probable loss to all.

A business so carefully nurtured by its two founders, who repeated in all the agreements the provision as to the rights of deceased partners' interests therein; the faithfulness with which the rights of the Stevenson estate were conserved by Foster in the agreement of 1901; the acknowledged good will and valuable property name; the amazing income and profits shown, all indicate that it was not intended that a deceased partner's interest, whose representatives did not wish to withdraw, can be forced to accept a minimum amount as shown by the stock or book value, applicable solely to another class of withdrawing or retiring members.

Distribution of this interest will be sus-

pending until further order of court, pending the filing of a stipulation by the executor and the Foster beneficiaries as to the manner in which this interest shall continue to be represented in the firm.

The petition of the surviving partners is dismissed.

For petitioners, *Lazear & Orr.*

For respondents, *S. S. & C. B. Mehard.*

**Circuit Court, United States,**  
*WESTERN DISTRICT OF PENNA.*

**OVERHOLT & CO. v. GERMAN-  
AMERICAN INSURANCE CO.**

*United States Courts—Removal of causes—Ap-  
plication for.*

The defendant should file his application for a removal of a cause from the State to the United States courts at or before the time when he is required by law or the practice of the state to make any defense whatever in its courts, and if such a defense has been made a petition to remand will be granted.

An affidavit of defense and the practice act or a rule of court in pursuance thereof is an answer within the meaning of the act of Congress relating to the removal of causes.

No. 64 November Term, 1906. Also same against nine other insurance companies at Nos. 65, 66, 94, 95, 96, 97, 98, 99 and 100 of the same term.

Opinion by EWING, J. Filed August-7, 1907.

These cases are before the court on motions to remand to the common pleas of Fayette county, Pennsylvania, from which they were removed by the several defendants without leave or authority of that court.

It seems that when application was made to the court in which the suits were originally brought, it embraced not only a petition to remand, but also a petition to consolidate various cases against the same company, which process of consolidation the defendants of their own volition made in transferring the causes to this court, although the applications aforesaid had been denied by the court of original jurisdiction.

Several reasons are assigned in support of the motions to remand, but the only one

thought necessary to refer to is that the application for the removal of the causes from the State court was made too late.

An act of Congress in such cases provides that the petition for removal may be filed "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which said suit is brought to answer or plead to the declaration or complaint of the plaintiff."

The rules of the court of common pleas of Fayette county aforesaid provide that "in all actions on policies of insurance, etc., if the plaintiff shall file on or before the return day of the writ, a statement showing the amount he believes to be due from the defendant, together with a copy of the book entries or instrument upon which the suit is brought, etc., he shall be entitled to judgment for want of an affidavit of defense, as follows, viz.: if the writ shall have been duly served and the said statement shall have been duly filed and a copy thereof served on the defendant prior to the return day, judgment by default may be entered any day after fifteen days subsequent to the service of said statement, etc., unless the defendant files an affidavit of defense."

The provisions of this rule were complied with by the plaintiff in these cases, so far as the service of the writ and the filing and serving of a copy of the statement on the defendant is concerned, and the defendants also complied with its provisions by filing, on the return day, affidavits of defense.

The writs in all these cases, except in those cases embraced in No. 94 of November term, and one of the cases embraced in No. 95 of November term, were served on March 14, 15 and 16, 1906, and those in No. 94 and one in No. 95 of November term, on March 20, 1906, and the return day of all was April 2, 1906.

By the above cited court rules the defendants were required to file affidavits of defense on April 2nd in all the said cases, except those served on March 20th, where they were required to file them on April 4th. But the defendants filed all their affidavits of defense on April 2nd and the petition for removal was not presented to the court until April 13th.

It is now contended by the plaintiffs that



the petitions for removal having been presented after the defendants were required by the rules of the State court to file affidavits of defense and did so file such affidavits, that it was then too late to remove said causes, while the several defendants insist that the requirements of the act of Congress that the application for removal shall be made before they are required to answer or plead to the declaration or complaint of the plaintiff, does not embrace affidavits of defense, but merely technical answers and pleadings. These claims of the respective parties present the questions before us for determination.

The Procedure Act of May 25, 1887, in its 3rd section directs that "The statement \* \* \* in the action of assumpsit shall be replied to by affidavit," and the above cited rule of the State court in Sec. 4 declares that "In all cases where affidavit of defense is required, it shall set forth specifically and at length the nature and character of the same and shall state whether the defense is to the whole or a part of the claim, and if only to a part it shall state to what part, and all items of the plaintiff's claim not traversed or denied shall be taken as confessed."

Conceding that an affidavit of defense in Pennsylvania practice is no part of the pleadings, as declared by the Supreme Court in *Muir v. Insurance Company*, 203 Pa. 338, yet it is an answer to the plaintiff's claim, and under the said rules of court determines what the issue between the parties is, for only those matters alleged on the one side and denied on the other, are by those rules put in issue, and indeed, the answer of the defendant under the rules of court of Allegheny county makes the answer an affidavit of defense, for in Sec. 1 of Rule 8, it is directed that the defendant shall "file an answer verified by affidavit and such items of the claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted," and by Sec. 2 it is further provided, "If the specification and statement be filed with the precipe, they shall be taken as an affidavit of claim, and defendant shall, without further notice, file his answer thereto within the time re-

quired for filing affidavits of defense, which answer shall be taken as an affidavit of defense."

Thus in every view of the case an affidavit of defense is an answer to the plaintiff's claim and so important in this respect that it frames the issue to be tried between the parties.

In *Martin v. B. & O. R. R. Co.*, 151 U. S. 673, Mr. Justice Gray, in delivering the opinion, says that this provision regarding the time for the presentation of a petition for removal "allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas." And again, "Constructing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."

To the same effect also is *Wabash Western Railway v. Brow*, 164 U. S. 271.

It was upon the authority of these two cases that it was determined in *Muir v. Insurance Company*, supra, that the petition for the removal of the case from the State court to the Federal court should be filed before the defendant is required to file an affidavit of defense.

The same principle is again declared in *Powers v. Chesapeake & Ohio R. R. Co.*, 169 U. S. 92, where it is stated that "undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts."

According to the plain interpretation of these decisions the application for the removal of these causes was made too late and the petition to remand must be granted.

It may be stated that these cases have all been tried in the State court and passed upon by the Supreme Court on appeal and the judgments of the lower court affirmed.

The cases are therefore remanded.

For plaintiff, *Gordon & Smith*.

For defendant, *Jennings & Jennings*.

## Executive Department,

HARRISBURG.

### WOFFINGTON'S CASE.

*Public officers—Justice of the peace—Removal from district—Vacancy in office—Residence—Resignation—Appointment by governor.*

It does not necessarily follow that, because a justice of the peace has removed from the district for which he was commissioned, a vacancy is thereby created in his office. He can perform no official acts outside of his district, but it is not every removal from the district which will create a vacancy. The question of residence is one of intention, to be determined before a proper tribunal under the evidence presented.

U. was elected justice of the peace for East Deer township at the spring election of 1905, and was duly commissioned for five years. At the spring election of 1907, W. was elected to succeed U. on the theory that a vacancy existed by reason of the alleged removal of U. from the township. W. filed his acceptance, but the secretary of the commonwealth did not issue a commission to W. by reason of the fact that there was at that time no evidence in the office of the secretary that a vacancy existed. On March 5, 1907, U. tendered his resignation to take effect April 20, 1907, which resignation was accepted by the governor March 7, 1907.

Quere (1) Was W. entitled to receive a commission by virtue of his election in February, 1907? (2) Or, was there then a vacancy in the office of justice to be filled by appointment by the governor? Held, that there was no determination of the question of intention to change residence at the time of the spring election in 1907, and there was, therefore, no vacancy to be filled at that election; there was no vacancy until the resignation of U.; the election of W. was a nullity, and the governor should appoint.

Request of Governor STUART for opinion.

Opinion by TODD, Attorney-General.

Filed May 13, 1907.

From the papers on file and the records

in the office of the secretary of the commonwealth the following appear to be the relevant facts in reference to the above application:

At the spring election of 1905, Charles Uhlinger was duly elected one of the justices of the peace for East Deer township, Allegheny county. He thereupon filed his acceptance of said office with the prothonotary of the said county of Allegheny, which acceptance was duly certified by said prothonotary to the secretary of the commonwealth, and he was thereupon duly commissioned as justice of the peace for a term of five years from the first Monday of May, 1905.

At the spring election of 1907, J. A. Woffington was voted for as one of the justices of the peace of said township to succeed the said Charles Uhlinger on the theory, as stated in the letter of the prothonotary of Allegheny county, on file in the office of the secretary of the commonwealth, that a vacancy existed in said office by reason of the alleged removal of the said Charles Uhlinger from said township of East Deer to the borough of Springdale in said county.

The said J. Woffington filed his acceptance of said office with the prothonotary of Allegheny county, who certified the same to the secretary of the commonwealth. By reason of the fact that there was at that time no evidence in the office of the secretary of the commonwealth that a vacancy existed in said office, no commission was issued to the said J. A. Woffington. On March 5, 1907, the said Charles Uhlinger, after the spring election of 1907, tendered to the governor of the commonwealth his resignation of said office of justice of the peace, to take effect April 20, 1907, which resignation was accepted by the governor of the commonwealth on March 7, 1907. There is no evidence in the papers on file to show whether or not the constable of the said township of East Deer gave twenty days notice by advertisement preceding the February election of 1907 of a vacancy in said office of justice of the peace. It is claimed, however, by the said J. A. Woffington that such notice was given.

Under the above state of facts the question arising is whether the said J. A. Woffington

is entitled to receive a commission by virtue of his election in February, 1907, or whether there is now a vacancy in the office of the said justice of the peace, to be filled by appointment by the governor of the commonwealth.

The election of justices of the peace is governed by the act of March 22, 1877, P. L. 12. The second section of this act provides as follows:

"It shall be the duty of the constable of the proper ward, district, borough or township to give at least twenty days' notice, by advertisement, preceding the election to be held on the third Tuesday of February of each year, of the expiration of the term of the commission of any alderman or justice of the peace that may expire on or before the first Monday of May following, and also of any vacancy that may happen by death, resignation or otherwise."

Section 3 of the same act provides as follows:

"If any vacancy shall take place after any ward, district, borough or township election, by reason of the erection of any new ward, district, borough or township, or from the neglect or refusal of any person elected to accept a commission within sixty days after the date thereof, or by death, resignation or otherwise, such vacancy shall be filled by appointment by the governor until the first Monday of May succeeding the next ward, district, borough or township election."

The applicant for a commission, J. A. Woffington, contends that a vacancy existed in said office by reason of the removal of the duly elected and commissioned justice of the peace, Charles Uhlinger, during his term of office, from the township for which he was elected, and that this was such a vacancy as is contemplated by Sec. 2 of the act of 1877, *supra*, and entitled the voters to elect a successor to the said Charles Uhlinger at the spring election of 1907.

There is no record evidence that the notice required by said Sec. 2 of the act of 1877 was given by the constable of the township of the existence of the alleged vacancy.

"The provisions of this section are mandatory and under them twenty days' notice by the constable is a condition precedent to the election of a person to fill a vacancy in

the office of justice of the peace caused by death, resignation or otherwise." Justice of the Peace Appointments. Opinion of Deputy Attorney-General Elkin, 16 Pa. C. C. R. 335.

It is, however, unnecessary in this case to make the validity of the election of J. A. Woffington depend alone upon the question of notice. If there was no actual vacancy, the election was a nullity, and for the purpose of the present inquiry it may be assumed that the requisite notice was given under the act of 1877. Under the act of February 22, 1902, no justice of the peace shall act as such unless he shall reside within the limits of the district for which he was commissioned, but it does not necessarily follow that, because a justice of the peace has removed from the district for which he was commissioned, a vacancy is thereby created in his office. He can perform no official acts outside of his district, but it is not every removal from the district that will create a vacancy. The question of residence is one of intention, to be determined before a proper tribunal under the evidence presented. In the present case there was no determination of the question of intention at the time the spring election of 1907 was held, and therefore, legally there was no vacancy to be filled at that election; consequently there was no vacancy in the office of justice of the peace in East Deer township, Allegheny county, until the resignation of Charles Uhlinger, under date of March 5, 1907, was accepted by the governor. In fact, the presentation of such resignation by Charles Uhlinger indicates that up until that time he was the duly elected justice of the peace for the township in question.

In view of the fact that a vacancy now exists in said office by reason of the resignation of Charles Uhlinger, accepted March 7, 1907, the governor should fill such vacancy by making an appointment under Sec. 3 of the act of 1877, and as such vacancy has taken place since the township election of this year, such appointment should be made until the first Monday of May, 1908.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

# Pittsburgh Legal Journal

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No. 10.

PITTSBURGH, PA., SEPTEMBER 18, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

WITOSKI v. MOSBY.

*Equity—Waste waters—Jurisdiction.*

Defendant built a wall on the lower line of his lot and also deposited earth next the adjoining lot. Plaintiff, the owner of the adjoining lot, claimed that this caused waste waters to flow into his cellar and filed a bill to enjoin. Held, that plaintiff had an adequate remedy at law and equity had no jurisdiction. *McMahon v. Thornton*, 5 Superior Court 503, followed.

No. 935 October Term, 1906.

Opinion by FRAZER, P. J. Filed May 6, 1907.

The purpose of this bill was to enjoin defendant from permitting waste water to flow from the premises of defendant to that of plaintiff. From the bill, answers and proofs we find the following facts:

### FINDINGS OF FACT.

1. Plaintiff and defendant are the owners of adjoining properties on Colmar street, Thirteenth ward, Pittsburgh, defendant's property lying higher than that of plaintiff. On plaintiff's lot is erected a brick dwelling-house on Colmar street and a frame dwelling-house on the rear of the lot, fronting on an alley. On defendant's lot is erected a two-story brick dwelling-house, which fronts on Colmar street. Each lot has a frontage of 20 feet and a depth of 96.63 feet.

2. In the month of June, 1906, defendant erected a dry stone retaining wall on the lower side of his lot, extending back from his house a distance of about 18 feet, and after the completion of the wall leveled his lot by taking earth from the upper side and depositing it on the lower side thereof.

3. In grading defendant's lot, the earth deposited on the lower side adjoining plain-

tiff's property is held in place in part by the retaining wall above referred to and in part by the house on the rear end of plaintiff's lot. As to whether or not the earth was placed against plaintiff's property at her request, the testimony is conflicting, and is immaterial so far as this proceeding is concerned.

4. Plaintiff's contention is that waste water and also rain water flows upon her premises from the premises of defendant, keeping her houses damp and at times causing water to accumulate in the cellars of her dwellings, and as a result of such flow of water the houses have been damaged and the renting value of the rear one decreased from \$10 to \$7 per month.

5. Defendant's contention is that no water flows from his property to that of plaintiff, and that the water which accumulates in the cellars of plaintiff's houses comes from springs upon her premises.

### CONCLUSIONS OF LAW.

This is not a case for equity. In *McMahon v. Thornton*, 5 Superior Court 503, it was held that injuries to property occasioned under circumstances almost identical with those of this case should be heard in a court of law. In that case the court says:

"While each owner of a lot has the right to grade his lot in any way which is most convenient to himself, yet, if in the grading of the lot he leaves his lot above that of the adjoining lot owner and supports the earth used in the filling and grading of his property by a retaining wall, he must so construct his retaining wall as to inflict no injury upon the adjoining owner; and if the material which he uses for the purpose of retaining the earth used in the filling and grading of his lot is of such a character that it permits the water from his lot to flow through it upon the adjoining property, thereby injuring his neighbor, he is liable in an action for damages for whatever injury is occasioned thereby."

The testimony fails to bring this case within the jurisdiction of a court of equity, and plaintiff having an adequate remedy at law for any injury done to her property, by reason of the grading of defendant's lot and the erection of the retaining wall thereon, this bill must be dismissed.

And now, May 6, 1907, bill dismissed at plaintiff's cost.

For plaintiff, *C. W. Sypniewski.*  
For defendant, *W. H. Stanton.*

(Common Pleas No. 2, Allegheny Co.)

**BASELTINE, Executor, for use,  
v. WHITNEY.**

*Conflict of laws—Note—Accommodation endorser—Married woman.*

In a suit against a married woman as accommodation endorser on a note it was alleged the debt was contracted and note delivered in Ohio; but it was not alleged that the note was made in Ohio and the note was dated in Pennsylvania. Held, that the law of Pennsylvania would govern.

No. 761 January Term, 1907.

Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed April 27, 1907.

The action is upon a promissory note made by the defendant to the order of her husband and endorsed by him to the plaintiff's testator. An affidavit of defense was filed alleging that the defendant was a married woman; that the note was made for the accommodation of her husband, and that the plaintiff's testator, who loaned the money upon it, had full knowledge of this fact at the time. The affidavit also sets up certain negotiations about stock, which appears to have been given with the note as collateral by the husband of the defendant. A supplemental statement of claim was then filed, which consists principally of denials of the matters set up in the affidavit of defense. This supplemental statement sets up that the contract for the loan was made by the defendant with the plaintiff's testator in Ohio; that the note was delivered to the plaintiff's testator by the husband of the defendant and the money there paid, and that by the laws of Ohio a married woman is liable as an accommodation maker. To this supplemental statement of claim an answer was filed, which merely points out that the note is dated in Pittsburgh. The note itself is dated in Pittsburgh, and was

presumably made there. The plaintiff carefully avoids alleging that it was made in Ohio, and we must therefore infer from the pleadings that the note was made by the defendant in Pennsylvania as an accommodation for her husband, and delivered to him in Pennsylvania, and that afterwards he used it in Ohio to borrow money. We are of opinion that upon these facts and the state of the pleadings, the plaintiff is not entitled to judgment.

Rule discharged.

For plaintiff, *Williams & Edwards.*

For defendant, *White, Childs & Scott.*

**District Court, United States,**

*WESTERN DISTRICT OF PENN'A.*

**In the Matter of WINCHESTER,  
Bankrupt.**

*Bankrupt—Concealment of assets—Discharge—Objections to.*

A bankrupt in his schedule of assets failed to include \$2,000 received by him from his father's estate and expended about a year before his bankruptcy in the improvement of land inherited by his wife. Subsequently to his adjudication in bankruptcy his trustee filed a bill in equity against the bankrupt and his wife for the purpose of charging his property for the benefit of his creditors with the money so expended, and after a full hearing the bill was dismissed on the merits of the case. Exceptions to the bankrupt's discharge by a creditor alleged concealment of assets as above set forth in answer to which the bankrupt offered in evidence the findings of the equity court. Held, that the exceptions should be dismissed and discharge granted.

No. 1909, in Bankruptcy.

Opinion by EWING, J. Filed August 7, 1907.

On July 12, 1902, Winchester filed a voluntary petition in bankruptcy, and in that same fall presented his petition for discharge, to which objections were filed by one C. Smalley, a creditor. The matter was referred to Joseph M. Force, referee, as special master, and on June 10, 1903, he filed his report finding that the bankrupt was guilty of a fraudulent concealment of assets within the meaning of the act of Con-

gress, and recommending that his application for discharge be refused. To this report exceptions were filed by the bankrupt, and the matter only came before the court for hearing the middle of last month during the session in Erie.

The act of fraudulent concealment which the special master finds the bankrupt to have been guilty of was his failure to enumerate in his schedules of assets and to advise the trustee of the fact that he had during the year preceding his petition in bankruptcy expended some \$2,000, funds received by him from his father's estate, in the improvement of property of his wife.

It seems that the bankrupt's father in the fall of 1900 conveyed to the bankrupt's wife a lot of ground on which was an old house, and died shortly thereafter. By his death the bankrupt inherited some \$3,000 from his father's estate, and it was a portion of this fund which he expended in the spring and summer of 1901 in the improvement of his wife's property, pursuant in fact to a desire expressed by his father that he should thus make the house habitable and a comfortable home for his family.

Under these circumstances, and the expenditure having been made so long prior to the proceeding in bankruptcy, it is a very serious question whether there really was any intent, fraudulent in fact or in law, on the part of the bankrupt to conceal assets from his creditors when he made no statement of this expenditure to the trustee or in his schedule of assets.

Subsequent, however, to the report of the master and by leave of this court, the trustee filed a bill in equity in the Court of Common Pleas of Erie county against the bankrupt and his wife for the purpose of charging her property, for the benefit of the creditors of the bankrupt, with the amount of money he had expended in these improvements.

That case was concluded by decree entered December 31, 1906, dismissing the bill, from which decree it does not appear that any appeal was taken.

In his finding and opinion, the Judge sitting in that case found that at the time these improvements were begun and up until July of that year (1901) when they

were completed, the bankrupt's credit was good, although he was insolvent when they were finished; but all of the claims for work and materials used in said improvements have been paid, a portion thereof out of money borrowed by the bankrupt for that purpose, for some of which at least he gave satisfactory security. Among the security thus given was a judgment for \$300, which constituted the first lien on the real estate inherited from his father and an additional piece purchased by the bankrupt himself, and a mortgage for \$600, which constituted a second lien upon said real estate. And he further finds that when said improvements were begun said Winchester did not know what they would cost, that he contracted for the labor and materials and it was very improvident to spend so much on the old house, but that his wife, Mrs. Winchester, supposed him to be perfectly solvent and never conspired with him to defraud his creditors, had no thought that his improving her property would result in his insolvency and that there is nothing to show bad faith on her part at any time, and concluded, as matter of law, that the bankrupt's general creditors have no lien upon the real estate of Mrs. Winchester by reason of his expenditures and improvement of her real estate, as there was no connivance on her part and she had no knowledge of his failing circumstances when such improvements were made and consented to.

In view of this plenary action before a court of competent jurisdiction, the record of which was introduced into this case upon the argument on the exceptions to the report of the special master, there seems to be no reason now for the conclusion arrived at by him upon the less complete and partial hearing had before him, but that the decree in the equity proceedings should control. That decree virtually determines that the bankrupt had no interest in the real estate of his wife subject to the claim of his creditors, and consequently, in failing to disclose the expenditures he had made in making these improvements, he cannot be guilty of a concealment of assets. This was the only objection urged against him found valid by the report of the master.

The exceptions to the report of the master

are therefore sustained, the exceptions to the discharge overruled and dismissed and the discharge granted.

For bankrupt, *T. S. Woodworth.*

For exceptants, *D. A. Sawdey and J. E. Reed.*

## Court of Common Pleas,

CENTER COUNTY.

**Cambria & Clearfield Railway Company and the Pennsylvania Railroad Company, lessee of the Cambria & Clearfield Railway Company v. J. Edward Horn, Rembrandt Peale and E. H. Elsworth.**

### *Railroads—Overhead crossing—Land-owner—Right of way.*

A land-owner through whose land a railroad company has located a right of way has the right to construct a proper overhead crossing to take over his coal to the only railroad in operation at the time.

No. 1 Equity Docket, November Term, 1905. Bill in equity to restrain defendants from crossing plaintiff's property.

Opinion by ORVIS, P. J. Filed Jan. 15, 1906.

On the preliminary hearing, both plaintiffs and defendants developed the evidence upon which they respectively rely to such an extent that it might have enabled us to have made a final disposition of this case; but, as they refused in open court to agree that this should be done, it becomes our duty, at this stage of the proceeding, to decide whether or not the preliminary injunction granted ex parte shall be continued or not.

To a certain extent the question of title is involved, so much so, indeed, that defendants argued that the bill is in the nature of an ejectment bill, and for that reason should be dismissed. Indeed, the relation of the parties as to the title and their respective interests are somewhat obscure so far as their relative equities, at least, are concerned. Both plaintiffs and defendants have a common ancestor in the Philipsburg Coal, Iron and Oil Company,

whose policy it was to develop their property by procuring the building of a short railroad from the borough of Philipsburg, and for this purpose conveyed to a trustee by mortgage in 1866, eight several strips of land numbered respectively from one to eight, and which continuously form the right of way of the proposed railroad. The controversy has reference to tract No. 8, which was that portion of the railroad right of way extending into and almost through a tract of land in the name of John Myer, containing about four hundred and sixteen acres; the same mortgage also conveys to the said trustee the said John Myer tract. The instrument recites that this trust conveyance is for the benefit of bonds in the total sum of \$25,000, and provides among other provisions that in case of default of interest and if the holder of the bond so elects, the trustee could convey to the holder of the bonds the railroad iron and superstructure, roadbed and lands connected therewith, in full satisfaction of the mortgage, and reconvey to the Philipsburg Coal, Iron and Oil Company, inter alia, the said John Myer tract. This latter provision was actually carried into effect by the said trustee in the mortgage reconveying the John Myer tract to the mortgagor, without making it expressly subject to the vested rights and provisions in favor of the bondholders and conveying to the Tyrone and Clearfield Railroad Company, the holder of the bonds, by a separate instrument, inter alia, lot No. 8 which, as before stated, represented the railroad right of way through the John Myer tract. On account of the provision that the entire John Myer tract should be reconveyed to the mortgagor, it might be argued that the intention of the parties to the contract was to convey to the bondholders, at their election, merely the railroad proper, and such a right in a certain portion of the John Meyer tract as would enable them to maintain a railroad, which right would cease upon abandonment without a formal reconveyance or release on the part of the railroad company being necessary, and that the railroad company in removing the superstructure thirty-three years ago and during all that intervening period exercising no rights of ownership and making no actual

use or occupation of their right of way, might be construed by such acts to have adopted the same view, especially as they have not during the said period made known to the assessor any title or claim of title to the said strip of land for taxation purposes.

We prefer, however, to consider that the plaintiff railroad company has to-day such a title in the right of way as would be good against mere willful trespassers and to reach our conclusions along other lines of thought.

We heartily concur in the oral argument of plaintiffs' counsel, that the rights of railroad corporations should be as carefully guarded and attentively cared for in courts of justice as those of the individual citizen. Railroads have a right to stand upon title and to maintain the same, and should not be censured for so doing. Nevertheless, in arriving at the equities in the present proceeding, the nature of the parties and the origin of their title cannot be overlooked. The plaintiff railroad here stands upon a naked title arguing that it owns the narrow strip of land through the defendants' larger tract, once operated as a railroad, but for thirty-three years abandoned, and because it is possessed of that title it argues that the owner of the adjoining and surrounding tract cannot cross the right of way, at least in the way the defendants are now attempting. It shows no actual present injury or damage, except the breach of the close. The defendants are leasees of the owner of the John Myer tract, and have the right for about seven years to dig, mine and remove the coal from the John Myer tract and an option to renew the said lease for the further period of ten years. It appears from the uncontradicted evidence, subsequent to the removal of the railroad superstructure down to a very recent period, that there have been repeated requests to the Pennsylvania railroad to relay its tracks, so that the coal in this immediate section could be brought into the market. That very recently the New York Central and Hudson River railroad has built a branch railroad through the John Myer tract, apparently with the permission or, at least, the acquiescence of the plaintiff railroad; the defendants have constructed a coal tipple at a siding and connection with the new railroad, and was in

the act of constructing an overhead bridge or causeway over the plaintiffs' right of way from the mouth of the drift to the said coal tipple. As far as we can ascertain from the evidence, the defendants have no practical way of getting their coal to the railroad except by crossing the plaintiffs' right of way, in the manner that they have attempted to do. Defendants' witnesses have further testified that their proposed causeway was elevated as high above the plaintiffs' right of way as would be consistent with an economical mining and delivery of the defendants' coal. We cannot see any actual damage or injury done the plaintiffs in the construction of this connecting causeway, at least as long as the plaintiffs fail to use its abandoned right of way for any railroad or other lawful purposes, much less has that irreparable injury been committed as should compel a chancellor to interfere. This very subject-matter has been more carefully discussed in a case based upon very analagous facts by the Supreme Court as late as 1901. In the case of the *Mt. Pleasant Coal Co. v. D. L. & W. R. R. Co.* 200 Pa. 434, the appellant coal company that had been delivering its coal to the Delaware, Lackawanna and Western Railroad Company, attempted to construct an overhead bridge in order to deliver its coal to a competing railroad. The plaintiff below obtained an injunction in the court of common pleas on the express ground that the act of April 16, 1838, prohibits any person from constructing an overhead crossing. Justice Dean, in reversing this decree and setting aside the injunction, elaborately discusses the relation of the parties growing out of the purchase by the railroad company of the right of way and the reservation of the coal in and under the same, and construing that relationship to mean that the owner of the property on both sides should have the right to operate even to the extent of building an overhead bridge to deliver the coal to a competing railroad. He even refuses to say that they might not reach the same conclusion even if the railroad had obtained its title under the rights of eminent domain.

It seems that the facts in the present case present even a stronger case than the authority referred to. Of course, the statute relied



upon by Judge Archbald for granting the injunction in the cited case, would have no application to the present controversy, because whatever might be the rights of the plaintiffs to the locus in quo, it is at least not now at that point an operating railroad. But in the very nature of things, the owners of farms and other properties through which a railroad builds and constructs its improvements, must have the right within reasonable limits and under proper restrictions of passing their persons and conveying the products of their farms and mines from the one section of their property to the other. It is for this reason that the Pennsylvania legislature in 1849 made it obligatory upon the railroad to construct a causeway for each separate property, wherever necessary and while, no doubt, the legislature had more specifically in mind when passing that act the construction of causeways or overhead bridges for the use of farmers and farm products, it need not necessarily be limited to the use of that class of citizens. And so the courts have uniformly held that railroad companies cannot prevent the proper crossing of their rights of way by the adjoining land-owners. To hold otherwise would make railroads themselves a nuisance instead of the great benefit that they now are. They are everywhere recognized as a great public benefit, and their building and construction is encouraged, because they do tend to develop our properties and increase the values of property rights. They are allowed to secure by purchase and by adverse proceeding, if necessary, thousands of miles of narrow rights of way, cutting through the lands of our citizens, often in the most arbitrary manner. But, while every interest and right of the railroad company in these narrow strips of land should be safeguarded, it would be intolerable to allow such holdings to prevent the owners of the property through which they meander to get the products of their farms, mines and factories to market. If the Delaware, Lackawanna and Western railroad, although in actual operation and anxious to take the coal of the land-owner, was not allowed to prevent the said land-owner from building an overhead bridge for the purpose of taking his coal to a competing railroad, why should

we prevent the defendants in this case from crossing a mere right of way for the purpose of taking coal to the only railroad in operation at or near the defendants' mines? It is largely on this ground that we think the preliminary injunction should be dissolved; but, as stated before, we fail to see any such injury suffered by the plaintiffs that cannot be compensated by damages in an action at law; besides, the defendants would suffer a greater injury by the continuance of the injunction than that suffered by the plaintiffs in refusing their prayer.

It is unnecessary to cite authorities to show that a chancellor would refuse to act under such conditions, nevertheless, we do feel that the plaintiffs have rights in the premises that should not be totally disregarded; they have argued that a permitted trespass can ripen into an adverse right, that it is possible that they might rebuild this branch and wish to again operate as a railroad. If such reconstruction should be consummated, the defendants' crossing this right of way as at present proposed, would be a serious injury; while this under the circumstances is quite remote and sufficient in our opinion to justify a perpetual injunction, many reasons now unforeseen might make it desirable or pressingly necessary for the plaintiffs to assert their rights.

We will, therefore, dissolve the preliminary injunction on the defendants filing a paper agreeing to consider the construction and maintenance of their bridge or structure across the plaintiffs' right of way as a mere sufferance and not to be made the basis for building up an adverse title against the plaintiff, and upon filing a bond in the sum of \$3,000, with good and sufficient sureties to be approved by us, conditioned upon the defendants removing the said structure from the plaintiffs' right of way on sixty days' notice of the plaintiffs having rebuilt their branch railroad to the lines of the John Myer tract, and conditioned further to remove the said structure across the plaintiffs' right of way when for this or any other reason this court sees fit or right to modify or terminate the defendants' proposed manner of crossing the same.

And now, to wit, January 13, 1906, the defendants having filed the bond and agree-

ments in accordance with the terms of our preliminary decree and opinion, the preliminary injunction heretofore granted against the defendants in the above-stated case is hereby dissolved, in accordance with and subject to the terms and conditions of the said preliminary opinion and decree.

For plaintiffs, *John Blanchard and Edmund Blanchard*.

For defendants, *D. L. Krebs and A. L. Liveright*.

### Certificates of Reasonable Doubt.

What has sometimes been called a scandal in the criminal procedure of New York state has been eliminated by recent amendment to the Code of Criminal Procedure. As the law stood, one appealing from a conviction for a crime could apply not only to the judge before whom the case was tried, but, if he chose, to a justice of the supreme court in any part of the state, for a certificate of reasonable doubt, and, if he could obtain it, was thereby enabled to keep out of jail during the pendency of the appeal. Without imputing anything but the purpose to do justice, to any of the justices of the state, the result of this proceeding has undoubtedly been that many a person under conviction for crime, if he had money enough to pay the expenses, has been able to get a certificate of reasonable doubt, and thereby secure a long period of freedom, pending appeal, when there was no reasonable doubt of guilt in the mind of the judge who tried the case, or of anybody else who knew much about the matter. A skilfully prepared application to some judge at the remote end of the state would often be sufficient, when no judge in the vicinity would grant the certificate. Of course, poor criminals could not usually pay the expense of sending counsel around the state to find a judge who would grant the certificate, while a rich criminal could, and the result was to decrease public confidence in our system of justice, and to increase the notion that rich criminals were favored. The maxim that justice, to be effective, must be prompt, is obviously true; but when a more or less notorious criminal, after he has been convicted, is able to go about, as free as ever, for two or three

years, pending appeal, and, if he ever gets into prison, does so after the public has well-nigh forgotten the case, the value of the punishment as an object lesson to the public is well-nigh lost.

The amendment to the New York law, as stated in the press reports, provides that an application for a certificate of reasonable doubt may hereafter be made only to the judge before whom the case was tried, or to a justice of the supreme court, at a special term thereof, in the judicial district where the trial was held. Considering the size of the judicial districts in the state of New York, and the number of justices of the supreme court in each district, this certainly seems to furnish every opportunity that justice can require to make such applications; and the public will be saved from the unpleasant query that has sometimes arisen, as to the reason why an attorney should go 400 miles to a judge at the other end of the state, for such a certificate of reasonable doubt, when able and competent judges were near at hand.—*Case and Comment*.

### Attempt to Commit Suicide.

Statutes making it a crime to attempt to commit suicide have been for years in force, or at least on statute books, in several states, at least in New York, North Dakota and South Dakota. But it does not appear that there have been any convictions under these statutes. In the late case of *May v. Pennell*, 101 Me. 516, 7 L.R.A. (N.S.) 286, 64 Atl. 885, it was held that an attempt to commit suicide is not a crime, in the absence of a statute making it such, or making suicide a crime. If suicide is made a crime, it is obvious that statutory provisions making it a crime to attempt to commit an offense apply, at least in terms. The opinion in this case says that, "although there have doubtless been innumerable attempts to commit suicide in the United States, no instance has been discovered in which there has ever been a conviction for this offense, on either statutory or common-law grounds, prior to that in the case at bar." And the conviction in the case at bar was, of course, destroyed as a precedent by the decision of

the court of last resort holding that the attempt was not a crime, and discharging the prisoner. As shown by the note to the case in 7 L.R.A. (N.S.) the court overlooked, however, the decision in the case of *State v. Carney*, 69 N. J. L. 478, 55 Atl. 44. In that case the court affirmed a conviction for attempting to commit suicide, and held, while there was no independent enactment in the state making an attempt at suicide a crime, that suicide, like any other murder, was common-law felony, and that an attempt at suicide was an indictable offense at common law. This case distinguishes the Massachusetts cases which held that such attempts were not crimes, on the ground that the common-law offense had been repealed by implication by the Massachusetts statute. A note to the Maine case in 7 L.R.A. (N.S.) points out the fact that in Massachusetts and in Maine the statute as to attempts to commit an offense provides that the punishment therefor, if no punishment is expressly provided for such attempt, shall be "the same kind of punishment that might have been inflicted if the offense attempted had been committed, but not exceeding one-half thereof," while in New Jersey there is no such implied limitation. But the case is governed by a statutory provision that offenses of an indictable nature at common-law, if not otherwise provided for by legislature, "shall be misdemeanors and be punished accordingly." The authorities on the question are, however, very scanty, and attempts to commit suicide, while very common, are very rarely prosecuted. The public policy of punishing attempts at such is much questioned by some people, and some feeling of doubt on this point, combined with pity for the unfortunate person who has made the attempt, probably accounts for the practical immunity from punishment of those who make such attempts, even where the statutes explicitly provide for their punishment. It is certain, however, that, if such statutes are not to be enforced, they should be repealed.

—Case and Comment.

A note without consideration, payable out of the estate of the maker after his death, is held, in *Sullivan v. Sullivan*, (Ky.) 7 L. R. A.; N. S.) 156, to be void.

The secretary of a local branch of a fraternal society, charged with the duty of collecting the assessments on benefit certificates issued by the grand lodge, is held, in *Trotter v. Grand Lodge, I. L. of H. (Iowa)* 7 L.R.A. (N.S.) 569, to be the agent of such lodge with respect to the business of such collections.

A bank depositor who intrusts the examination of the pass books and returned vouchers to an agent, who has been guilty of raising its checks, is held, in *First Nat. Bank v. Richmond Electric Co. (Va.)* 7 L.R.A. (N.S.) 744, to be charged with such knowledge as the agent has in making the examination.

Whether or not a bank receiving and crediting to a depositor a check on another bank is entitled to enforce it as owner is held, in *Fayette Nat. Bank v. Summers (Va.)* 7 L.R.A. (N.S.) 694, to depend upon its having been the intention of the parties that the deposit shall be treated as cash, which fact is to be determined by the jury.

A bank which has paid an overdraft of a local agent upon the bank account of his principal, who resides in another state, without ascertaining the authority of the agent, is held, in *Merchants' Nat. Bank v. Nichols & Shepard Co. (Ill.)* 7 L.R.A. (N.S.) 752, not to be able to assert failure of the principal to examine the pass book and returned vouchers after the balancing of the account, as an estoppel upon the principal to deny liability for the overdraft.

The promise of a clerk of a local camp of a mutual benefit society to notify the representatives of an insane member of assessments is held, in *Sheridan v. Modern Woodmen of America (Wash.)* 7 L.R.A. (N.S.) 973, not to bind the society so as to prevent its claiming a forfeiture of the certificate for non-payment of dues, notice of which is regularly mailed to the member, although no notice is given to the representatives according to the promise, where the laws of the order provide that no act on the part of the clerk shall have the effect of creating a liability on the part of the society, or of waiving any right belonging to it.

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No. 11.

PITTSBURGH, PA., SEPTEMBER 25, 1907.

## Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

FOGAL v. SWART.

*Building restriction—Agreement to abolish—  
Parties to—Bill to enforce restriction.*

Plaintiff on February 4, 1907, purchased a lot in a plan upon which there existed a building restriction as shown by the record plan. On that day an agreement was drawn up among the property owners for the abolition of the building restriction which was signed, inter alia, by D. R. Speer (plaintiff's predecessor in title) per J. J. Speer. The latter had no written authority from D. R. Speer to sign the agreement and there was no ratification of it until the next day when the said D. R. Speer acknowledged it. On bill filed to enforce the restriction against one of the owners who set up this agreement as a defense, it was held, that the burden was on the defendant to show the restriction had been abolished, which he failed to do because from the agreement it appeared that it was not ratified by plaintiff's predecessor in title until after the sale to plaintiff. Decree in favor of plaintiff.

No. 9 May Term, 1907. In Equity.

Opinion by SWEARINGEN, P. J. Specially presiding. Filed June 21, 1907.

The plaintiff filed this bill, alleging that on February 4, 1907, he became the owner of lot No. 11 in a plan of lots in Scott township, fronting on Banksville avenue, upon which there is a building line thirty feet west of the west line of said avenue; that the defendant, who owns lot No. 1 in said plan, which fronts upon the same avenue, has commenced the erection of a frame building upon his lot, within said building line and in violation of the right of the plaintiff to an easement of light, air and prospect unobstructed; and he prays that an injunction may issue restraining the completion of said structure, that said struc-

ture be decreed unlawful, that defendant be required to remove the same.

In his answer the defendant admits that he has commenced said building, and that said building line had existed, but denies that the easement thereof is annexed to lot No. 11 or any other lot fronting on Banksville avenue, at the time plaintiff acquired title, because the same had been extinguished and abolished by written agreement of the lot owners on Banksville avenue, exhibit "A" attached to answer, of which plaintiff had notice. Defendant also alleges that he believes and expects to prove that plaintiff is not a purchaser in good faith, innocently or for value.

From the evidence we make the following:

### FINDINGS OF FACT.

1. Milton I. Baird, the owner of a tract of land in Scott township, Allegheny county, Pennsylvania, laid the same out into a plan of lots called "Espy Farm," which was duly recorded on July 1, 1901, in the recorder's office of said county of Allegheny, in Plan Book Vol. 18, page 186. In said plan there is a street, 33 feet in width, called Banksville avenue, upon which eighteen lots front on the westerly side thereof, numbered 1 to 18, inclusive. Said Milton I. Baird established building lines along the streets of said plan, among others, a building line 30 feet from the westerly side of said Banksville avenue, parallel therewith, which building line is marked upon the record of said plan. There is also endorsed upon the record of said plan the following, viz:

"There is annexed to each lot as an easement appurtenant to it the free right until April 1, 1920, of light, air and prospect unobstructed by anything save trees, shrubs, plants, fountains, statuary, other ornamental structures not over ten feet high intended for ornament merely, open porches not over fifteen feet wide with or without roofs, combs, steps, fences and such other projections from dwelling houses not materially interfering with light, air or prospect, as are or shall be usual or frequent and reasonable, over all the parts of the other lots fronting on the same street lying outside of the building line designated."

Prior to January 29, 1907, no buildings

or other structures were erected on the lots in said plan, fronting on Banksville avenue in violation of said building restriction.

2. On October 20, 1905, William M. Swart, the defendant, purchased the lot No. 1 in said plan from William J. Payne et ux., who had purchased the same from said Milton I. Baird by deed dated October 5, 1905, which conveyance was made subject to the building line and to all building or other restrictions set forth in the explanation endorsed on the record of the plan aforesaid. Said lot fronts 48 feet on the westerly line of Banksville avenue, and thence runs back westerly 120 feet, narrowing to 16 feet in the rear. The defendant also owns the two lots adjoining No. 1 and his residence occupies the rear half of said lot No. 1.

3. On or about January 29, 1907, the defendant commenced the erection of a frame store or business building upon that portion of said lot No. 1 which fronts on Banksville avenue. This building is 30 feet by 50 feet. It stands back about two inches from the side line of Banksville avenue and occupies in depth the entire easement upon said lot No. 1. The building has no cellar and is set upon posts. It was weather-boarded and under roof on February 4, 1907, and some work within was then commenced. The lot stood seven or eight feet above the grade of the street, and a few months before this time the defendant had levelled off the front portion of lot No. 1 for this building, but had made no excavation below the level of the street.

4. From September 21, 1905, to February 4, 1907, D. R. Speer had been the owner of lot 11 in said "Espy Farm" plan, which fronts 40 feet on the westerly side of said Banksville avenue and extends back westerly 120 feet to an alley. By deed dated February 4, 1907, recorded in the recorder's office of said county in Deed Book Vol. 1536, page 147, D. R. Speer and wife conveyed said lot No. 11 to W. T. Fogal, the plaintiff, which deed contained the following:

"This conveyance is made subject to the building line and to all building and other restrictions set forth in the explanation endorsed on the record plan above mentioned and referred to."

The consideration for this deed was \$900, \$250 of which was paid in cash and a mortgage for \$650 was given for the balance of purchase money.

5. Mr. Fogal, the plaintiff, resided in Chartiers township, which adjoins Scott township. He had, a few years ago, purchased a property near this "Espy Farm" plan, which he had sold a short time before the transactions in this case. He was familiar with said plan of lots and with the building restrictions. On or about February 2, 1907, Lester E. Larned proposed that plaintiff purchase this lot from Mr. Speer. The plaintiff had been upon the ground, January 13, 1907, but did not go again to look at the property, as he was familiar with it and thought the lot a bargain. He states that he purchased the lot for the purpose of building a home. He did not employ anyone to examine the title. He borrowed the \$250 with which to make the cash payment from Mr. M. H. Gottschall, which, however, he has repaid. The deed was executed and delivered to plaintiff on February 4, 1907, some time in the afternoon. The next morning plaintiff went to this property, as he stated, to see Mr. Gottschall in order to obtain from him a letter to a party in Connellsville, with whom he expected to place a loan. Whilst there, he found that defendant was engaged in constructing the said building upon lot No. 1 as aforesaid, and he then came to the city, employed John A. Metz, Esq., as attorney, and filed the bill in this case sometime in the afternoon of February 5, 1907.

6. Both Mr. M. H. Gottschall and Mr. Lester E. Larned are residents of the neighborhood of the property under consideration, and both of them were interested in preventing the defendant from completing said building upon lot No. 1 "Espy Farm" plan. They, with others, had previously employed Mr. John A. Metz as their attorney in the controversy. Undoubtedly Mr. Gottschall, Mr. Larned and Mr. Metz were all active in having the plaintiff purchase the lot under consideration, yet we cannot find from the evidence that either Gottschall or Larned was the agent, or that Mr. Metz was the attorney of the plaintiff in the purchase of lot No. 11, "Espy Farm" plan.

7. There was executed and placed upon file in the recorder's office of said county of Allegheny a paper purporting to abolish said building line on said Banksville avenue. See exhibit "A" attached to defendant's answer. This paper was first recorded February 4, 1907, in Deed Book Vol. 1534, page 9. It was again recorded February 6, 1907, in Deed Book Vol. 1534, page 10. And it was finally recorded again on February 9, 1907, in Deed Book Vol. 1534, page 13. Said paper and its endorsements are as follows:

## EXHIBIT "A."

"Whereas, it is the unanimous desire of all the owners of the lots in M. I. Baird's Plan of Espy Farm, Scott township, which fronts on Banksville avenue, that the thirty foot building line indicated on said plan affecting said lots fronting in Banksville avenue be abolished, no building being yet erected on any of said lots; and

"Whereas, M. I. Baird, former owner of said plan, is willing that the present owners may have and hold said lots fronting on said Banksville avenue free and discharged from said building line;

"Now therefore, we, the undersigned, being all the owners of lots in M. I. Baird's Plan of Espy Farm fronting on Banksville avenue, in consideration of the advantages which we each will derive from the abolition of said building line, do hereby agree with and among ourselves, each with every other, that from and after the date of this agreement the said building line of thirty feet from Banksville avenue, affecting all the lots in said M. I. Baird's Plan of Espy Farm fronting on said Banksville avenue, shall be abolished, and that each owner of any of said lots may build out to the line of Banksville avenue if he so desires without injury or hindrances to or from any of us, our heirs or assigns.

"This agreement shall be binding upon each of us, our several heirs and assigns.

"In witness whereof, we have hereunto set our hands and seals this 28th day of March, 1906.

"The abolition of the building line as set forth herein meets with my approval.

"Attest:

[Seal]

"W. M. Swart,  
"C. W. Overton,

Milton I. Baird,  
D. R. Speer,  
Per J. J. Speer,  
W. M. Swart,  
Ferd. Kleppick,  
Leanah S. Thomas,  
By Jno. W. Thomas,  
G. H. Rea,  
Peter J. Sauer,

"C. W. Overton,  
"Charlie Statlander,  
"W. M. Swart,

"W. M. Swart,  
"John H. Bossert,

"John F. Joyce,  
"Clara Beck,  
"W. M. Swart,  
"J. Wm. Belschner,  
"John Kraus,  
"John Kraus,  
"H. M. Stilley,

Robert Stiff,  
Philip J. Hunt,  
Joseph Campbell,  
V. Bopp,  
John W. Thomas,  
Leanah S. Thomas,  
W. M. Swart.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Before me, a Notary Public in and for said county and state, on this 4th day of February, 1907, came the above named W. M. Swart, one of the parties to the above agreement, and acknowledged said agreement to be his act and deed to the end that it may be recorded as such.

"Witness my hand and notarial seal, the day and year aforesaid. MINNIE E. THOMAS,

"[Seal]

Notary Public.

"My commission expires end next session of Senate.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Recorded on this 4th day of February, A. D. 1907, in the Recorder's office of said county in Deed Book Vol. 1534, page 9. Given under my hand and the seal of said office the day and year aforesaid. JOHN A. FAIRMAN,

"[Seal]

Recorder.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Before me, a Notary Public in and for said county and state, on this 5th day of February, A. D. 1907, came the above named John W. Thomas and Leanah S. Thomas, his wife, two of the parties to the above agreement, and acknowledged the above agreement to be their act and deed and desired the same to be recorded as such.

"Witness my hand and notarial seal the day and year aforesaid. JOHN KRAUS,

"[Seal]

Notary Public.

"My commission expires February 15, 1907.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Before me, a Notary Public in and for said county and state, on this 5th day of February, A. D. 1907, personally appeared W. M. Swart, D. R. Speer, Fred Kleppick and Peter J. Sauer, four of the parties to the above agreement, and acknowledged said agreement to be their act and deed to the end that it may be recorded as such.

"Witness my hand and notarial seal the day and year aforesaid. HUGH M. STILLEY,

"[Seal]

Notary Public.

"My commission expires January 28, 1911.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Re-recorded on this 6th day of February, A. D. 1907, in the Recorder's office of said county in

Deed Book Vol. 1534, page 10. Given under my hand and the seal of the said office the day and year aforesaid.

JOHN A. FAIRMAN,  
Recorder.

"[Seal]  
"Commonwealth of Pennsylvania,  
"County of Allegheny, ss:

"Before me, a Notary Public in and for said county, on this 8th day of February, 1907, came the above named G. H. Rea and Robert Stiff, and on February 9, 1907, came V. Bopp, Joseph Campbell and W. M. Swart and acknowledged said agreement to be their act and deed to the end that it may be recorded as such.

"Witness my hand and notarial seal this 8th day of February, 1907.

HUGH M. STILLEY,  
Notary Public.

"[Seal]

"My commission expires January 28, 1911.

"Commonwealth of Pennsylvania,

"County of Allegheny, ss:

"Re-recorded on this 9th day of February, A. D. 1907, in the Recorder's office of said county in Deed Book Vol. 1534, page 13. Given under my hand and the seal of the said office the day and year aforesaid.

JOHN A. FAIRMAN,  
Recorder."

"[Seal]  
8. It is not pretended that this agreement was signed by all the owners of lots in the "Espy Farm" plan. It was not signed by all of those who owned lots on Banksville avenue, a street in said plan, prior to the delivery of the deed aforesaid to the plaintiff.

When said agreement was first recorded, February 4, 1907, the last three names, to-wit: John W. Thomas, Leanah S. Thomas and W. M. Swart, were not signed to it.

On February 4, 1907, when said agreement was first recorded, it was not signed by D. R. Speer, the plaintiff's grantor. But it was signed "D. R. Speer, per J. J. Speer." D. R. Speer does not appear to have signed the paper, but, on February 5, 1907, he acknowledged the same before a notary public.

The paper was not signed by Leanah S. Thomas, an owner of a lot in said plan, when it was recorded February 4, 1907. Her name was signed thereto "Leanah S. Thomas, by Jno. W. Thomas." It was afterward signed by John W. Thomas and Leanah S. Thomas, was acknowledged by them on February 5, 1907, and the same day recorded the second time.

The paper was not signed by J. P. Richardson, owner of lot No. 4 in said plan,

prior to the delivery of the deed to the plaintiff. On February 4, 1907, Mr. Richardson gave an option to the defendant to purchase said lot within five days (exhibit No. 1.) Subsequently, on February 9, 1907, Mr. Richardson and the defendant entered into an agreement (exhibit No. 2) for the sale of said lot on or before February 9, 1908. No deed has yet been delivered.

The paper was not signed by Manus Cannon, owner of lot No. 9 in said plan, prior to the delivery of the deed to plaintiff. But after the paper was first recorded, on February 4, 1907, and the defendant had obtained the option from Mr. Richardson and had agreed to purchase the lot of Manus Cannon, he, the defendant, along with John W. Thomas and Leanah S. Thomas, again signed the said paper.

9. There is no written evidence of the authority of J. J. Speer to sign the name of D. R. Speer to the said writing, dated March 28, 1906, and attached as exhibit "A" to the defendant's answer, abolishing the building line on Banksville avenue and extinguishing said easement. D. R. Speer did not know that his name had been signed to the paper until the day after he had delivered the deed to plaintiff, as aforesaid. D. R. Speer had, however, verbally stated to the defendant that he was in favor of the abolition of said building line on Banksville avenue, and this was done prior to the time that defendant commenced the erection of said building. There is no evidence of any kind of the authority of John W. Thomas to sign the name of Leanah S. Thomas to said paper.

#### CONCLUSIONS OF LAW.

1. By virtue of the marking of the building line upon the plan of "Espy Farm" and the endorsement of the explanation thereon, mentioned in finding of fact 1, and the subsequent conveyance of said lots, subject thereto, there was created by deed an easement, appurtenant to each of the eighteen lots of said plan, fronting on Banksville avenue, for light, air and prospect, unobstructed by any building such as the defendant contemplates erecting thereon. The defendant purchased and held said lot No. 1 in said plan, and D. R. Speer purchased and held said lot No. 11 in said plan, under

and subject to said building restrictions, and said easement was appurtenant to the same.

2. D. R. Speer conveyed said lot No. 11 to plaintiff, under and subject to said building restrictions, and the plaintiff was an innocent purchaser thereof for value, without notice of an abolition of said building restrictions and of the extinguishment of said easement.

It is true the plaintiff hurriedly bought the lot. He did not go to see it on February 4, 1907, when he bought, and he did not have the title examined. But all of this he had a legal right to do. He had the right to rely upon the record. If he had gone to the record on February 4, 1907, he would not have found any lawful record of the abolition of these building restrictions. If he had gone upon the ground he would have found a building commenced, which was in violation of the restrictions, and if he had then enquired of the defendant, he would not have found that the building restrictions had been abolished. If, by making enquiry, the plaintiff would not have ascertained that the building restrictions had been abolished, he will not be deprived of his legal rights because he failed to seek useless information.

3. The burden was upon the defendant to establish that the building restrictions had been abolished and the easement extinguished. This he has failed to do. The writing, mentioned in finding of fact 7, did not, on February 4, 1907, operate as an abolition of said building restrictions and an extinguishment of the easement aforesaid. It was not then signed by the requisite parties. It must have been executed by all the parties, or the same was of no effect. J. J. Speer is not shown to have had written authority to sign the name, D. R. Speer, to said writing, and D. R. Speer did not attempt to ratify the unauthorized act of J. J. Speer until February 5, 1907, which was after plaintiff had acquired title. It is doubtful whether J. J. Speer had even verbal authority to sign this writing on behalf of D. R. Speer.

John W. Thomas is not shown to have had any authority to sign the name of Leanah S. Thomas to said writing.

J. P. Richardson had not signed the said writing on February 4, 1907, and the granting of the option (exhibit No. 1) to defendant did not vest in the latter such a title as would have authorized him to extinguish said easement.

We do not now decide the question, whether or not it was necessary to have the signatures of the owners of lots fronting on other streets in said "Espy Farm" plan, as, in the view we have taken, it is unnecessary to do so.

4. The plaintiff is not estopped from asserting his rights by any parol conversations which took place between D. R. Speer, his grantor, and the defendant prior to the time when defendant commenced the erection of said building on lot No. 1. These conversations amounted to no more than a statement of Mr. Speer that he was in favor of abolishing the building restrictions. He executed no deed or other writing: See *Erb v. Brown*, 69 Pa. 216; *McDonald v. Simpson*, 3 Watts 129; *Weaver v. Gilt*, 16 Sup. Ct., 418; *Garvey v. Refractories Co.*, 213 Pa. 177.

5. The attempt of the defendant to erect said building upon that portion of lot No. 1 in the "Espy Farm" plan, between the westerly side of Banksville avenue and the parallel building line, thirty feet westerly thereof, is unlawful, is in violation of said building restrictions and of the easement for light, air and prospect annexed to lot No. 11 of the plaintiff, and equity has jurisdiction to restrain the completion of the building and to decree the removal of the obstruction.

6. The costs should be paid by the defendant.

Let a decree be drawn in accordance herewith.

For plaintiff, *John A. Metz*.

For defendant, *Hugh M. Stilley and Ivory, Kiskaddon & Moore*.

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## Executive Department,

HARRISBURG.

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### MERCANTILE TAXES.

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*Taxation—Mercantile tax—When acts of 1907 operate.*



The act of April 25, 1907, entitled "An act to equalize taxation of restaurants, eating houses and cafes," does not become operative until the assessments are made for the year 1908.

Nor does the act of May 25, 1907, relating to the license taxation of pool rooms, etc., nor the act of May 7, 1907, relating to the license taxation of stock brokers, etc., become operative until 1908.

Request of Deputy Auditor-General Crichton for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed July 9, 1907.

Your communication of June 12, enclosing inquiries addressed to you from the president of the board of mercantile appraisers of Philadelphia, the treasurer of Lancaster county, and the treasurer of Delaware county, has been duly received.

The substantial question raised by your communication and referred to in said inquiries, relates to the time at which the three acts of assembly hereinafter mentioned—all of which are connected with the mercantile tax system of the commonwealth—become operative. These acts of assembly are as follows;

1. Act No. 93, approved April 25, 1907, entitled "An act to equalize taxation of restaurants, eating houses, and cafes."

2. Act No. 190, approved May 25, 1907, entitled "An act to provide revenue by imposing a license tax on the keepers of all shooting galleries, shuffleboard rooms, billiard or pool rooms, for purposes of profit, or any other places in which any game is played on a table with the use of balls and cues; and bowling alleys, ninepin alleys, tenpin alleys, or other alleys or places in which in any game is played with the use of balls or pins, or other objects; providing for the collection of said tax, and imposing certain duties upon mercantile appraisers and county treasurers."

3. Act No. 139, approved May 7, 1907, entitled "An act to provide revenue by imposing a license tax on all stock brokers, bill brokers, note brokers, exchange brokers, merchandise brokers, factors or commission merchants, real estate brokers and agents, and pawnbrokers, whether persons, firms, limited partnerships, or corporations; pro-

viding for the collection of said tax, and imposing certain duties on county treasurers and mercantile appraisers."

It is contended by some of the citizens of the commonwealth affected by the terms of the above-mentioned acts of assembly, that the taxes therein provided for are to be assessed and paid under the provisions of these acts of assembly for the present mercantile tax year of 1907. The material inquiry, therefore arising, is whether or not these acts are operative in the matter of the assessment and collection of mercantile taxes for the mercantile tax year beginning May 1, 1907.

A brief discussion of each of the acts, in the order in which they are mentioned above, will be conducive to clearness. Prior to the approval of said act No. 93, eating houses, restaurants, etc., were licensed and taxed under the provisions of Secs. 20, 21, 22 and 23 of the act of April 10, 1849, P. L. 570, entitled "An act to create a sinking fund and to provide for the gradual and certain extinguishment of the debt of the commonwealth." Under the provisions of that act, eating houses were classified into eight classes and the amount of tax assessed in proportion to the amount of business transacted. The said act No. 93, approved April 25, 1907, provides for the payment of an annual mercantile license tax of \$2 and one mill additional on each dollar of the whole volume, gross, of the business transacted annually. Section 2 of act No. 93, provides that "the enforcement of the provisions of this act shall be under and in accordance with the laws of this commonwealth now in force, relating to the levy and collection of mercantile license tax." It, therefore, becomes material to investigate the laws now in force relating to the levy and collection of mercantile taxes. The act of April 20, 1887, P. L. 60, provides for the appointment of the appraiser of mercantile and other licenses and for the publication of the list of names and classification of each person subject to a tax. The general system of assessing and collecting mercantile license taxes, however, is provided for in the act of May 2, 1899, P. L. 184, entitled "An act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares, and merchandise, and providing for the col-

lection of said tax." By this act it is provided, for the purpose of carrying into effect its provisions, that the appointment of mercantile appraisers shall be made annually on or before December 30 of each year, by the county commissioners, except in cities of the first class, in which cities the auditor-general of the state and the treasurer of the city are authorized and required to appoint five suitable citizens, all of whom shall not be of the same political party, and whose term of office shall be three years. The act provides that it shall be the duty of the auditor-general to prepare and have printed proper blanks, which blanks are to be distributed by the respective mercantile appraisers for the purpose of securing from the persons subject to the payment of a tax the necessary data for the settlement of an account against such taxables by the county treasurer.

By Sec. 9 of said act of 1899, it is made the duty of every mercantile appraiser on or before the first day of May in each year, to certify to the county treasurer a correct list of all taxables, their classification, and the amount of license due from each taxable. This list is to be kept by the county treasurer for his guidance in hearing appeals, and in collecting the taxes. After appeals have been heard, and exonerations made, the corrected list is to be certified by the county treasurer to the auditor-general on or before the first day of July of each year. By Sec. 7 of said act, it is made the duty of every city or county treasurer to sue for the recovery of all licenses duly returned to him by the mercantile appraiser, if not paid on or before the first day of July in each year, within ten days after that date. By the act of June 14, 1901, P. L. 565, the time for bringing suit for delinquent mercantile taxes, is extended from ten days after July 1 to thirty days after that date.

The blanks prepared by the auditor-generals above mentioned, are under the provisions of the said act of 1899, to be forwarded by mail by the mercantile appraiser to the taxables at least ten days prior to the dates upon which he makes personal visits to the places of business of the taxables. After mailing such blanks the mercantile appraiser must personally visit the store, or

other place of business of each taxable. It is, therefore, apparent that under the act of 1899, the mercantile appraiser must be appointed on or before the thirtieth day of December of each year, and between the date of his appointment and the first day of May in the succeeding year, must mail the blanks specified in the act to the taxables, secure from them the necessary data for the settlement of accounts against them, make personal visits to the places of business of taxables, publish the list, where such publication is provided for by law, and place in the hands of the county treasurer on or before the first said day of May a correct list of taxables and the amount due from each taxable. The said act No. 93 was not approved until April 25, 1907. It is to be enforced in accordance with the mercantile license and tax laws of the commonwealth.

Prior to the date of its approval, the mercantile appraisers of the respective counties of the commonwealth must have sent out the above-mentioned blanks, made their personal visits, and published their lists containing assessments against restaurant keepers, etc., under the provisions of said act of 1849. It is impossible for the mercantile appraisers and county treasurers to make new assessments under the said new act No. 93, in accordance with the provisions of the said act of 1899, between the date of the approval of the new act and May 1, 1907. It follows, therefore, that the new act No. 93 cannot become operative until the assessments are made for the year 1908.

Coming now to act No. 190, approved May 25, 1907, it is to be noted that this act not only changes the amount of the tax upon billiard and pool tables, and ninepin alleys, and tenpin alleys, from \$30 for the first table or alley, and \$10 for each additional table or alley—the rate under existing legislation—to \$20 for the first table or alley, and \$10 for each additional table or alley, but also enlarges the list of articles and games subject to tax, including under its terms shooting galleries, shuffleboards and other games played with the use of balls or pins. It is provided by Sec. 3 of this act that it shall be the duty of every mercantile appraiser, in each of the counties of the commonwealth, to ascertain and assess

each and every keeper of shooting galleries, etc., in the manner provided by law for the assessment of mercantile license taxes. By Sec. 4 it is made the duty of such appraiser to certify to the county treasurer a correct list of all persons, firms or corporations assessed in the county in which he is appointed, which list, after appeals have been taken and exonerations made, shall be certified by the county treasurer to the auditor-general and state treasurer, on or before the first day of January in each and every year. It is clear that the license tax provided for in this act is to be assessed in the manner provided by law for the assessment of mercantile license taxes. As this act was not approved until May 25, 1907, it is absolutely impossible for mercantile appraisers and county treasurers to make assessments, under the provisions of this new act, for the year 1907. It follows that assessments cannot be made under this act until the regular time for making assessments in the year 1908.

With reference to act No. 139, approved May 7, 1907, an examination of its provisions shows that the classification of brokers subject to a tax is enlarged, and the methods of assessing the tax is changed from the present method of three per cent upon their annual receipts from commissions, discounts, etc., to a method based upon a classification of the brokers, subject to tax, according to the amount of business transacted. This act was not approved until May 7, 1907, and contains under its provisions, a system of securing data and assessing the tax provided for in harmony with the system provided for by the above-mentioned mercantile tax act of 1899.

The list of persons assessed must be certified to the county treasurer by the mercantile appraiser or board of mercantile appraisers, on or before the first day of May in each year. It is manifest, therefore, that assessment cannot be made under the provisions of this act for the year 1907. Each of the last two mentioned acts, to wit, act No. 190 and act No. 139, contain provisions indicating an intent upon the part of the legislature to avoid interference with cases pending, assessments made and licenses due at the time of the approval of the respective acts. The repealing clause in act No. 190

is as follows: "All acts or parts of acts inconsistent herewith are hereby repealed, except as to pending cases or licenses due thereunder," and the repealing clause of act No. 139 is as follows: "All acts or portions of acts inconsistent herewith be and the same are hereby repealed, except as to pending cases and assessments made thereunder."

Mercantile license tax assessments are made prior to the first day of May of each year. The license taxes are due when the lists are placed in the hands of the respective county treasurers, to wit, on or before the first day of May of each year. The lists are placed in the hands of the county treasurers for their guidance in hearing the appeals and collecting said license taxes; but no matter what the legislative intent may have been as to the time at which the acts in question should become operative, it is clear that assessments cannot be made under their provisions for the year 1907.

You are, therefore advised that the assessments already made for the year 1907, under the law as it existed prior to the approval of the acts in question, against the taxables affected thereby, are the only assessments upon which mercantile license taxes can be paid by, or collected from, taxables this year.

Assessments for the year 1908 should be made under the provisions of the new acts of assembly above specified, which at that time can become fully operative without conflicting with the general mercantile license tax law.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

Where, within four months period, a bankrupt, a country merchant, sells out his entire property, consisting of a store building and a lot, a stock of general merchandise, book accounts and a homestead, for 75 per cent of its fair value, it has been held, in *Houck v. Christy*, 18 Am. B. R. 330, that the purchasers, having knowledge that the bankrupt had been recently encumbering his property for small amount, and that the transaction was unusual, were chargeable with all the knowledge that reasonable inquiry might have disclosed, and in an action by the bankrupt's trustee they were not entitled to the protection of purchaser in good faith and for value.

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No. 12.

PITTSBURGH, PA., OCTOBER 2, 1907.

## Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

### LANG v. CITY OF ALLEGHENY.

*Cities—Increase of debt—additional burdens in bonds—Not authorized in original ordinance.*

The voters of the city of Allegheny authorized an issue of \$1,000,000 of 4 per cent bonds for water works purposes. Councils later passed an ordinance for the issue of the bonds at 4 per cent and free of all taxes levied under the laws of Pennsylvania. Held, that this last provision was an additional burden not authorized by the voters and the issuing of the bonds should be restrained.

No. 589 May Term, 1907. In Equity.

Opinion by KENNEDY, P. J. Filed August 3, 1907.

The original bill filed in this case sought to enjoin the defendants from the issue and sale of "Water Bonds 1907," to the amount of \$1,000,000, for the purpose of purchasing ground and the erection and construction of a new water reservoir for the city of Allegheny, and other constructions in connection therewith for the waterworks of said city, upon three grounds; viz:

First. That the ordinance providing for a vote of the electors of said city upon the question of authorizing said proposed issue of bonds is invalid by reason of irregularities in its adoption.

Second. That the advertisements for the proposals for bids for the purchase of said bonds are unlawful, in that they provide for the opening of said bids, etc., on the Sabbath day, commonly called Sunday.

Third. That the attempt to issue said bonds, pending appeal to the Supreme Court of the United States from the decree of the Supreme Court of Pennsylvania affirming the validity of an act of assembly pro-

viding for the consolidation of the two cities of Pittsburgh and Allegheny into one, commonly called the "Consolidation Act," is illadvised, hasty, unbusinesslike and highly inequitable to the taxpayers of said city.

The first ground, viz., irregularities in the adoption of the ordinance above referred to, was not pressed by counsel for plaintiff, either upon oral argument or in their brief—they conceding this was not now necessary to be considered for the determination of this case.

As to the second ground, no bids for the purchase of said bonds having been received pursuant to the advertisements referred to, it is not important and need not be considered. This also was conceded by plaintiff's counsel.

The third ground will be considered later.

An additional ground of injunction was presented in the amended bill, on which counsel for plaintiff now rely and which they earnestly press, viz: that since the failure to receive bids advertised for as aforesaid, the councils of said city have enacted another ordinance providing for the issue of "Water Bonds 1907" for the purpose aforesaid, of a character materially different from the bonds authorized by the voters of the electors, in that the bonds proposed by the last named ordinance impose an additional burden upon the taxpayers, not authorized by said votes; said alleged unauthorized additional burden being a payment by the city of all taxes that may be assessed upon said proposed bonds.

While counsel for plaintiff did not abandon their first ground of injunction, viz., alleged irregularities in the passage of the first ordinance above referred to, they did not ask that the case be determined on this ground, stating that it need not now be considered; and hence we assume as a matter of fact that there were no substantial or material irregularities in the passage of this ordinance.

The facts, therefore, material to the determination of the case, were admitted as follows, viz:

1. The councils of the city of Allegheny adopted an ordinance, which was approved by the mayor on the 17th day of January, 1907, providing for the submission to the

vote of the electors of the said city of the question of increasing the bonded indebtedness of said city in the amount of \$1,000,000 by an issue of bonds for that amount, bearing interest at the rate of four per cent per annum, for the purpose of purchasing ground for and the erection and construction of a new water reservoir, and the necessary cribs and connections therefor, and the construction and laying of water pipes and watermains throughout said city, and for the purchase of machinery and appliances for the waterworks; a copy of which ordinance is attached to plaintiff's original bill, marked "Exhibit A."

2. On January 17, 1907, the mayor of said city issued his proclamation for the holding of the election provided for in the ordinance recited in the first finding above, which proclamation stated: "Notice is hereby given to the electors of said city that in pursuance of ordinances, etc., etc., . . . an election will be held on Tuesday, February 19, 1907, . . . for the purpose of obtaining the assent of the electors to an increase of the bonded indebtedness of said city by the amount of \$1,000,000 . . . by an issue of bonds bearing interest of four per centum per annum, etc., etc."

3. Pursuant to the ordinance recited in first finding of fact above and the proclamation recited in the second finding above, the question therein mentioned was submitted to a vote of the electors of the said city at an election held February 19, 1907, at which election a majority of said electors voted for said proposed increase of indebtedness.

4. Pursuant to the vote of the said electors of said city an ordinance was passed by the councils of said city, and approved by the mayor thereof on March 24, 1907, authorizing the issue of bonds in the name of the city of Allegheny, to be designated "Water Bonds 1907," to the aggregate of \$1,000,000, to bear date April 1, 1907, and providing the times of payment thereof, together with interest thereon at the rate of four per cent per annum, payable semi-annually, and providing for the levy of a tax for the payment of the principal and interest on said bonds to be assessed "upon all subjects now or hereafter made liable to taxation for such purposes, and that all

bonds so issued shall be and become a part of the funded debt of the city of Allegheny," and further authorizing and instructing the controller to advertise for proposals for the purchase and sale of said bonds, and authorizing the mayor and controller to issue and sell the same. A copy of this ordinance is attached to plaintiff's original bill, marked "Exhibit B."

5. Pursuant to the authority and instructions of the ordinance recited in the fourth finding above, the said controller of said city caused the advertisements to be made for proposals for the purchase of said bonds to be submitted at a specified time, but received no bids or proposals therefor.

6. After the failure to sell any of said proposed bonds the councils of said city adopted another ordinance, which was approved by the mayor on May 17, 1907, authorizing or purporting to authorize an issue of bonds in the name of the city of Allegheny, to be designated "Water Bonds 1907," to the aggregate amount of \$1,000,000, to bear date May 1, 1907, and specifically providing the dates of payment thereof, with interest at the rate of four per cent per annum, and declaring and providing that "said bonds shall be issued free of all taxes and assessments which may be levied thereon or upon the indebtedness secured thereby, under any laws of the commonwealth of Pennsylvania now or hereafter to be passed, and said bonds shall contain a stipulation on the part of said city to assume and pay any such tax;" and further providing that until the said bonds shall be fully paid "there is hereby levied and assessed annually upon all subjects now by law liable or hereafter to be made liable to assessment for taxation for city purposes a tax sufficient to pay the interest on said bonds and any tax as aforesaid thereon," and the principal of said bonds "as they become due and payable according to their terms;" and further providing that said bonds "shall be and become a part of the funded debt of the city of Allegheny," for the payment whereof "the faith, honor, credit and property of said city are hereby pledged." Then follows authority and instruction to the city controller to advertise for proposals for the purchase and sale of

said bonds, and authority and direction to the mayor and city controller to issue and sell the same. A copy of this ordinance is attached to plaintiff's amended bill, marked "Exhibit E."

7. The amount of taxes upon said bonds authorized to be assessed and collected under existing laws, if said bonds shall be permitted to be issued, will amount to about the sum of sixty thousand dollars.

8. As to the third ground of injunction, viz., that the issue of the said bonds pending appeal to the Supreme Court of the United States from the decree of the Supreme Court of Pennsylvania affirming the validity of the "Consolidation Act" is illadvised, hasty, unbusinesslike, and wholly inequitable to the taxpayers of said city, it seems necessary only to find that the said "Consolidation Act" and the proceedings thereunder annexing and consolidating the city of Allegheny with the city of Pittsburgh, were by decree of the court of quarter sessions of Allegheny county, dated June 16, 1906, decreed to be valid; from which decree an appeal was taken to the Superior Court of Pennsylvania, and was by said appellate court affirmed November 19, 1906; and thereafter an appeal therefrom was taken to the Supreme Court of Pennsylvania, which on March 11, 1907, also affirmed said decree; and afterwards an appeal therefrom was taken to the Supreme Court of the United States, where the same is now pending. All of said appeals were accompanied by orders of supersedeas and had the effect of delaying the consummation of the consolidation decreed by the court of quarter sessions of Allegheny county.

The first and most important question arising from the facts found is, do the bonds proposed to be issued by the last ordinance above recited, of which exhibit "E" attached to plaintiff's amended bill is a copy, impose an additional burden upon the taxpayers of the city not authorized by the first ordinance above recited, of which exhibit "A" attached to plaintiff's original bill is a copy, and not authorized by the votes of the electors at the election held thereafter, said alleged unauthorized additional burden being the payment by the city of all taxes that may be assessed upon said proposed

bonds? Stated in other words, the question is, does the payment by the city of all taxes that may be assessed upon said proposed bonds increase the indebtedness of the city over that authorized by the votes of the electors at the election held after the passage of the first ordinance but before the passage of the last ordinance?

The position of the defendants is that the bonds proposed to be issued do not impose any additional burden upon the taxpayers or increase the indebtedness of the city above the amount authorized by the vote of the electors, because the taxes to be paid by the city on the bonds proposed to be issued, as well as the interest on said bonds, are all payable out of the current funds of the city. We cannot adopt this position, nor do we think any of the authorities cited by the defendants sustain it; and certainly we have not been able to find in Pennsylvania authority which in our opinion sustains it.

The first ordinance, exhibit "A" of the original bill, provides for submission to a vote of the electors of the question of increasing the bonded indebtedness of the city by the amount of \$1,000,000 "by an issue of bonds bearing interest at the rate of four per cent per annum," for the purposes therein stated. This conveys to the electors the information of the full amount of the burden to be imposed upon the taxpayers in case a majority of votes is cast in its favor, and the question of the imposition of such burden they are to determine by their votes. The proclamation of the mayor for the holding of such election is equally explicit, the purpose as stated therein being to obtain "the assent of the electors to an increase of the bonded indebtedness of said city by the amount of \$1,000,000 . . . . by an issue of bonds bearing interest at the rate of four per cent per annum." Thus it is clearly shown that the city officials applied to their constituents, for whom they are merely agents, for authority to issue bonds to the amount of \$1,000,000, bearing four per cent per annum interest; and having received such authority, the ordinance, exhibit "B" of the original bill, was passed providing for the issue and sale of the bonds, in exact accordance with the authority given, viz., bonds to the aggregate amount of \$1,-

000,000, and that "said bonds shall bear interest at the rate of four per cent per annum." And following this they advertised for proposals for the purchase and sale of the bonds, and stated therein that the bonds would bear interest at the rate of four per cent per annum. The city officials must have understood the authority granted them as agents and acted in strict accordance therewith up to this time.

Receiving no bids for the purchase of the bonds, councils then passed and the mayor approved ordinance exhibit "E" of the amended bill; which, after reciting the ordinance exhibit "A" of the original bill, for submission to the vote of the electors of the question of increasing the bonded indebtedness of the city and the result of the election thereunder, then provided for the issue of bonds to be designated "Water Bonds 1907," to the aggregate amount of \$1,000,000, to bear interest at the rate of four per cent per annum, and that "said bonds shall be issued free of all taxes and assessments which may be levied thereon, or upon the indebtedness secured thereby, under any laws of the commonwealth of Pennsylvania now or hereafter to be passed, and said bonds shall contain a stipulation on the part of said city to assume and pay said tax." And further provides for a levying and assessment annually of "a tax sufficient to pay the interest on said bonds and any tax assessed as aforesaid thereon," and the principal of said bonds "as they become due and payable according to their terms;" and the said bonds "shall be and become a part of the funded debt of the city of Allegheny."

This ordinance, the plaintiff contends, exceeds the authority granted by the electors at the election held under the first ordinance, exhibit "A" of the original bill, and is therefore null and void. With this contention we agree.

The assumption by the city of the payment of all taxes and assessments is made a stipulation of said bonds and as much a part of said bonds as the provision for the payment of the interest and the principal, and we are unable to see why this is not in excess of the authority granted at the election held, nor can we see how councils and the city officials can, after failing to sell the

bonds authorized by said election, issue other and different bonds, made more saleable by relieving the purchaser from the payment of taxes thereon and imposing the payment of the same upon the taxpayers without a majority vote of the electors giving such authority. It seems to us that, if they can do this, they can also, without another election, increase the rate of interest to be paid; for the argument of defendants is that both interest and tax are payable out of the current funds of the city.

We find no Pennsylvania authority directly applicable, but the case of *Major v. Alden Boro.*, 209 Pa. 247, cited by defendants, shows how closely the city officials must keep within the scope of the authority granted by the votes of their electors, and how requisite it is that the electors be plainly notified of the full amount of the proposed increase of indebtedness, so that they may vote intelligently and understand exactly the whole of the burden which their votes will impose upon taxpayers.

We think the assertion that the tax on the proposed bonds is to be paid out of the current funds of the city does not affect the question, which is whether or not the ordinance, exhibit "E" of the amended bill, does not increase the funded debt of the city to an extent in excess of the authority given by the voters of the electors. We think it plainly does. The bonds, by the terms of the ordinance, are to become part of the funded debt of the city, and are to contain a stipulation on the part of the city to assume and pay the taxes thereon.

As to the third ground of injunction, viz., that under existing conditions with reference to the "Consolidation Act," the attempt to increase the bonded indebtedness of said city is illadvised, hasty, unbusinesslike and inequitable to the taxpayers of the city, it seems only necessary to say that a serious question arises as to the time the consolidation of the two cities takes effect, in case the decree of the court of quarter sessions of Allegheny county, entered June 16, 1906, is affirmed by the Supreme Court of the United States on the appeal now pending. The several appeals are accompanied by orders of supersedeas, which have the effect of delaying the execution of the decree; but

if the appeal is dismissed, when does the decree of the court of quarter sessions take effect? The general rule is that a decree or judgment of the court of first resort, if appealed from and the appeal is dismissed, takes effect as of the date of the original decree or judgment. Are there such special circumstances in this case that the general rule should be departed from? If the general rule is to be followed, it is plain that it would be inequitable to issue the bonds in question. Pending the appeal, only provision should be made for carrying on such business as may be necessary; but anything that would impose a burden of many years duration upon the taxpayers of either city should be avoided. In view of the uncertainty that exists, plaintiff's counsel insist that the injunction should be granted, at least until the pending appeal is determined. While there seems to be much force in this position, it does not seem to be necessary now to grant the injunction upon this ground, inasmuch as we are so thoroughly convinced that the defendants must be restrained from the issue of the bonds in question upon the other ground stated above and discussed.

Our conclusion of law is that the ordinance of the councils of the city of Allegheny, approved by the mayor thereof May 17, 1907, attached to plaintiff's amended bill, marked "Exhibit E," is unauthorized by law and null and void, and that the defendants must be restrained from issuing, selling, or advertising for sale the bonds in question, as prayed for in said amended bill.

Let a decree be drawn in accordance herewith.

For plaintiff, *D. F. Patterson and L. K. & S. G. Porter.*

For defendant, *Lee C. Beatty.*

It was held, In re Weinreb, reported in 18 Am. B. R. 387, that a bankrupt who refuses to answer a question relating to an alleged payment to a creditor of a large sum of money just before bankruptcy, upon the ground that his answer would tend to degrade and incriminate him, will be denied his discharge, although he afterwards signifies his willingness to answer.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### OLDHAM et al. v. ENTERPRISE MARBLE & GRANITE CO.

*Promissory note—Suit by payee—Affidavit of defense—Insufficiency of—Guarantee.*

In a suit by a payee of a renewal note against the maker, the affidavit of defense set up that the note was given for a machine which was purchased upon a guarantee of plaintiff for one year to do a certain amount of work, which guarantee had failed, and referred to a card given by the defendant to plaintiff at the time of delivery which provided for payment by the note in suit with the statement that "as soon as the machine arrives we will test the same and if it proves satisfactory we will make settlement as per above terms." Held, that the card was not a guarantee but merely a statement of the capacity of the machine. Rule for judgment for want of a sufficient affidavit of defense made absolute.

No. 1122 January Term, 1907. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed May 27, 1907.

The suit is by the payee against the maker of a promissory note, dated October 8, 1906, at thirty days, which was given in renewal of a note of June 8, 1906, at four months, the note having been given in payment for a surfacing machine sold by plaintiffs to defendant. The order for the machine offers payment by a four months' note and states "as soon as the machine arrives we will test same, and if it proves satisfactory, we will make settlement as per above terms." When this note became due, defendant requested its renewal for the reason that it was unable to make collections, and upon maturity of the renewal note, defendant offered to renew again for another thirty days, which offer was refused by the plaintiffs. The affidavit of defense sets up that the machine was purchased upon the guaranty of the plaintiffs for one year that it would do a certain amount of work per day of eight hours; that the machine worked satisfactorily until December, 1906, and then ceased to work, and that they thereupon offered to return it. A supplemental affidavit of defense was filed,



setting out that before purchasing the machine they had received a card containing the statement that the machine would do the amount of work set out in the first affidavit of defense, and that they had received a positive guaranty from the local agent of the plaintiffs that the machine would do the amount of work stated on the plaintiffs' card; and that in December, 1906, the machine failed to work, although it had worked satisfactorily before.

It is quite evident that by the guaranty alleged in the first affidavit, of the amount of work which the machine would do, was meant the statements on the card set up in the second affidavit, but upon inspection they do not appear to be a guaranty. The order upon which the machine was purchased contains no reference to any guaranty, but refers to a test of the machine to be made by the defendant, and it is admitted that after that test they gave the note in suit, which was afterwards renewed. There is no allegation that the guaranty was omitted from the written contract by any fraud, accident or mistake. The guaranty alleged in the supplemental affidavit, which must be taken to be the defendant's best expression of its defense, is that the machine would do the amount of work stated in plaintiffs' card, and that relying on that guaranty they ordered the machine, and that after a full and fair trial of it, it was found that would not do one-half of the work represented. This is not an allegation of a guaranty for one year, but of the capacity of the machine, and that, the defendant admits testing before he gave the note.

We are of opinion, therefore, that the defense set up cannot avail the defendant, and the rule is therefore made absolute.

For plaintiff, *J. C. Sherriff*.

For defendant, *J. Chas. Dicken*.

### Court of Common Pleas,

CRAWFORD COUNTY.

### CONTINENTAL JEWELRY CO. v. DEWEY.

*Amendments—Parties—Justice of the peace.*

Where the ends of justice require it, amendment of

the names of parties to an action may be demanded as a matter of right. Such amendments are to be allowed in suits appealed from the judgments of a justice of the peace.

No. 145 February Term, 1907. Sur rule to show cause why amendments of the names of parties plaintiff and defendant should not be allowed.

Opinion by *THOMAS, P. J.* Filed March 24, 1907.

Under our several statutes, parties are entitled to amend the names of parties to an action, when by mistake, either of law or of fact, the proper parties for the support of the action have not been included. And it is the duty of the court on the showing of such facts to allow said corrections. *Kaylor v. Shaffner*, 24 Pa. 489; *Cochran et al. v. Arnold et al.*, 58 Pa. 399; and *Hackett v. Carnell*, 106 Pa. 291.

This may be done without notice to one whose name is added by amendment as a party defendant, though such additional parties should be brought in by an alias summons or by rule to appear and plead. *Leonard and Wife v. Parker et al.*, 72 Pa. 236; and *Pittsburg v. Eyth*, 201 Pa. 341.

Amendments are to be allowed in suits appealed from the judgment of a justice of the peace the same as those originally brought in this court. *Bratton v. Seymour*, 4 W. 329; *Johnston v. Fessler*, 7 W. 48; *Gue v. Kline*, 13 Pa. 60; *Seitz v. Buffum*, 14 Pa. 69; *Comfort v. Leland*, 3 Whart. 81; *Eyster v. Rineman*, 11 Pa. 147; and *Merrill v. Tamany*, 3 Pa. 433.

It would seem that the ends of justice require that these amendments be made and that it is our moral as well as legal duty to allow the same.

And now, March .25, 1907, the rule is made absolute and the amendments are allowed as prayed for.

For plaintiff, *J. W. Smith*.

For defendant, *Otto Kohler*.

[From *J. D. Roberts, Esq., Meadville, Pa.*]

In *Wright v. Sampter*, 18 Am. B. R. 355, it has been held that an unrequested repayment of loan, with letter stating money can no longer be used, is not sufficient alone to establish reasonable cause to believe preference was intended.

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No. 13.

PITTSBURGH, PA., OCTOBER 9, 1907.

## Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

### COMMONWEALTH ex rel. McELROY v. BOOTH.

*Assistant district attorney—Allegheny county—  
Act of July 14, 1897—Act of April 25,  
1907.*

The act of July 14, 1897, provided that the district attorney in Allegheny county might appoint one or more assistants, not exceeding four, to assist him in his duties, and fixed their salaries. The act of April 25, 1907, provided for the appointment of assistants, not to exceed eight, and fixed their salaries. Held,

The act of 1907 repealed the act of 1897.

The position of assistant district attorney is not a public office within the prohibition of the constitution as to an increase of salary.

No. 166 August Term, 1907.

Opinion by EVANS, J. Filed June 15, 1907.

This case comes before the court on a case stated in the nature of a special verdict. The relator, Robert T. McElroy, was appointed an assistant by Harry L. Goehring, district attorney of Allegheny county, on the 7th of January of 1907. On the 30th of April, 1907, he resigned and his resignation was accepted by the district attorney. On the 1st of May, 1907, the district attorney again appointed him an assistant and designated him as the first assistant, the same position that he held prior to the 30th of April, 1907.

In this action the relator claims \$416.66, one month's salary, ending with the 31st of May, as fixed by the act approved April 25, 1907. The defendant, the controller of Allegheny county, refused to issue a warrant for that amount for the reason, as he understood the law, that the relator was only en-

titled to a warrant for one month's salary at the rate of \$4,000 a year as fixed by the act of the 14th of July, 1897, P. L. 266. The question as to which act regulates the salary of the relator at the present time is the question presented to the court for its determination.

It is contended by counsel for the relator that he is not a public officer and that consequently there is no prohibition in the constitution for an increase of salary during his incumbency; and second, that the act of the 25th of April, 1907, repeals the act of July 14, 1897.

The act of 1897 is not artistically drawn. It might be a question whether the act is constitutional for the reason that the purposes of the act are not clearly set forth in its title. It is: "An act creating the office of assistant district attorney in the several counties of this commonwealth having over 500,000 and less than 800,000 inhabitants, providing for the appointment of said officers, prescribing their powers, duties and terms of office and fixing the salary of said officers." But an examination of the act itself discloses that the legislature did not create an office of assistant district attorney, it did not prescribe any powers for such an officer, it did not prescribe the duties of such an officer; it attempted to define the term for which the assistant district attorney provided for in the act should serve, which, it is admitted, was of no effect. The first section of the act reads as follows: "Sec. 1. Be it enacted, etc., that in all counties of this commonwealth having over 500,000 and less than 800,000 inhabitants the district attorneys of said counties shall have authority to appoint one or more assistants learned in the law, not exceeding four in number, one of whom shall be designated as first assistant, to assist the district attorney in the discharge of his duties. The first assistant shall receive a salary of \$4,000 per annum, and each of the other assistants shall receive a salary of \$2,500 per annum, to be paid out of the county treasury."

It is not always an easy matter to distinguish between a public officer and a public employment; but two attributes of a public office distinguished from public employment appear to be well defined in all the

distinctions that have been made by the courts of the several states. These are that a public office involves a delegation to an individual of some of the sovereign functions of government, and that the office is a continuing one and the powers, duties, and emoluments of that office devolve upon a successor when for any cause the office becomes vacant. "The words 'public office' are used in so many senses that it is impossible to give a precise definition covering all cases. It depends not upon what we call it, or even what a statute may incidentally call it, but upon the powers wielded and the functions performed and other circumstances manifesting the character of the position. *Mechen's Public Officers*, Sec. 45: 'The most important characteristic which distinguishes an office from an employment or contract is that the creation of an office involves a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public. Unless the powers conferred are of this nature the individual is not a public officer.' The test is that he should exercise something that can fitly be called a part of the sovereignty of the state." *Hartigan v. The Board of Regents of West Virginia University*, 49 West Va. 14. "An office is a public station or position to which a portion of the sovereignty of the country, either legislative, judicial or executive, attaches for the time being, and which is exercised for the benefit of the public. The word itself implies a more or less permanent delegation of a portion of governmental power, and coupled with legally defined duties and privileges continuous in their nature and which upon the death, resignation or removal of the incumbent devolve upon his successor." *Commonwealth v. Murphy*, 17 Montgomery County Law Reporter 174.

The act of 1897 does not directly give to the assistant to the district attorney appointed by him any powers; he has no independent action; he exercises no independent function; he has not independent duties assigned to him to perform. The act in itself does not define any duties which he is to perform. He is simply to assist the district attorney, subject to his orders and performing the duties which by law it is

required that the district attorney shall perform. He could not by mandamus be compelled to perform any specific act; he could not be indicted for any misfeasance in office because the law does not designate any particular act which it is his duty to perform. The position which he occupies lacks that element of permanency which is characteristic of an office. On the discharge of an assistant district attorney there is no vacancy existing. The district attorney may appoint or he may not. He may appoint one or he may appoint any number up to four. The exigency of the work in his office may require for one term of court the assistance of all the four provided by the act. The next term of court it may require none of these and he may discharge them all and leave the positions vacant. There are no duties which devolve upon the successor when by death, resignation or removal one of these assistants vacates his position. It may be said that in the discharge of his duties under the direction of the district attorney he is performing public duties in the prosecution of crime. So is the clerk who draws the indictment. The distinction is that neither of them is performing a public duty in his own right, in the right of the position which he occupies. He is performing these duties in the right and in the name of the public officer, the district attorney. As the clerk signs the district attorney's name to the indictment so does the assistant prosecute the offender in the name of the district attorney.

But for the sake of the argument, let us assume that the relator is a public officer. It is not contended by counsel for the defendant that if he is such public officer his of tenure office may not terminate at the will of the legislature; in other words, that if the act of 1907 repealed the act of 1897 that the repealing of that act would vacate the office held by the relator. But it is contended by counsel for the defendant that the act of 1907 did not repeal the act of 1897. The act of 1907 is much more skillfully drawn than that of 1897. It does not purport to create the office of assistant district attorney; it does not fix the term for which the person appointed to the position shall serve. The act is "An act providing for the appoint-

ment of assistant district attorneys in the several counties of this commonwealth having 750,000 and less than 1,200,000 inhabitants, prescribing the powers and duties and fixing the salaries of the said assistant district attorneys." Sec. 1: "Be it enacted, etc., that in all counties of this commonwealth having 750,000 and less than 1,200,000 inhabitants, the district attorney shall have authority to appoint one or more assistants, learned in the law, not exceeding eight in number, to assist the district attorney in the discharge of his duties. One of the said assistant district attorneys shall be designated the first assistant, shall receive a salary of five thousand dollars per annum, and each of the others shall receive a salary of three thousand six hundred dollars per annum. The salary herein provided shall be paid out of the county treasury. Sec. 2. That all acts and parts of acts inconsistent herewith be and the same are hereby repealed."

It follows that if the act of 1897 is inconsistent with the act of 1907, then it is repealed by that act, then the positions created by the act of 1897, whatever they may be called, whether they be public offices or merely employments, cease with the repealing of the act. The act of 1907 is not an amendment or a supplement to the act of 1897. It is a complete act in itself. And it can be readily assumed that one of the purposes of this act was to correct the inconsistencies in the act of 1897. But there is one result of the legislation as it stands with two acts, which would seem to determine conclusively that it was the purpose of the legislature to repeal the act of 1897 in toto by the passage of the act of 1907. If the act of 1897 creates the office of assistant district attorney, then it creates four such positions. And if the act of 1907 creates the office of assistant district attorney it creates eight such positions, and if the latter act does not repeal the former, then we have the legislature creating twelve positions of assistant district attorney for Allegheny county; and the district attorney to-day would have authority to appoint twelve assistants. It will not be seriously contended that that was the purpose of the legislature. In either view of the questions raised in this case we take it that the law is

with the plaintiff; that the act of 1907 repeals the act of 1897, and that on the approval of the latter act the positions created by the former were vacated. (2) That the position of assistant district attorney as created by these acts is not a public office, that the incumbent is not a public officer or within the prohibition of the constitution as to an increase of salary.

Let judgment be entered in the case stated for the plaintiff.

For relator, *Clarence Burleigh*.

For respondent, *Geo. H. Calvert*.

## Executive Department,

HARRISBURG.

### BERNARD CORR CO.

*Corporations—Application for charter—Sale of spirituous liquors at wholesale or retail—Acts of 1874, 1897 and 1901—Power of department of state.*

"The buying, rectifying, compounding, bottling and selling spirituous and malt liquors and mineral waters at wholesale," is a lawful business within the amending act of July 9, 1901, P. L. 624, and is not inhibited by any statute, and a charter may be granted therefor.

There may be a question as to the power of the court, under the license laws of the commonwealth, to grant a wholesale or retail license to a corporation for the sale of spirituous liquors, but that is a question for judicial determination, upon which the attorney-general's department expresses no opinion,

Request of Governor STURAT for opinion.

Opinion by TODD, Attorney-General.  
Filed June 4, 1907.

In the matter of the application of Bernard Corr Company for a charter, referred by you to this department for advice as to the propriety of granting letters patent upon the application filed, I beg to state that after hearing counsel for the applicants and the representative of the department of state, the following conclusions have been reached by this department:

It is stated in the brief filed by counsel for the applicants that Bernard Corr, one of the applicants for the charter, now has a wholesale liquor license in the city of Phila-

delphia, and that if the charter applied for is granted, an application will be made for the transfer of the license of the said Bernard Corr to the proposed corporation. The purpose for which the corporation is to be created, as stated in the second paragraph of the application, is as follows: "Buying, rectifying, compounding, bottling and selling spirituous and malt liquors and mineral waters at wholesale." Before directing that letters patent issue on this application you must find that the purpose stated is within the purposes of the class of corporations specified in Sec. 2 of the corporation act of April 27, 1874, and the several supplements thereto.

This inquiry raises the question of whether or not there is legislative authority for the formation of a corporation for the purpose set forth in this application.

Paragraph 18 of Sec. 2 of the act of April 29, 1874, P. L. 73, authorizes incorporation for the purpose of carrying on any mechanical, mining, quarrying or manufacturing business, "excluding the distilling or manufacturing of intoxicating liquors." The words "intoxicating liquors" include vinous, spirituous, malt and brewed liquors, and the act, therefore, prohibits incorporation for the purpose of distilling or manufacturing any intoxicating liquors. The amendment of this paragraph of April 10, 1897, P. L. 20, contains this language: "And also including the manufacturing and brewing of malt liquors, but excluding the distilling and manufacturing of spirituous liquors."

From the date of this amendment charters could, therefore, be granted for the manufacturing and brewing of malt liquors, but the granting of charters for the distilling and manufacturing of spirituous liquors was still prohibited.

The act of July 9, 1901, P. L. 624, amending the general corporation act, provides as follows:

"And also including the manufacturing and brewing of malt liquors and also including companies for the transaction of any lawful business not otherwise specifically provided for by act of assembly."

It will be observed that the clause in the amendment of 1897 "excluding the distilling and manufacturing of spirituous liquors"

has been omitted from the amendment of 1901. Incorporation for the purpose of "buying, rectifying, compounding, bottling and selling spirituous and malt liquors and mineral waters" is not specifically provided for by an act of assembly. The question then recurs: Is the certified purpose a lawful business within the meaning of the amendment of July 9, 1901? That it is a lawful business is sufficiently established by the fact that it is made the subject of taxation by the revenue laws of the state. It is true that the proposed corporation cannot conduct such business until it is duly licensed by a proper court and paid the requisite license tax or fee. The department of the state government clothed with the power of granting charters is not concerned with the question of granting or transferring a license to the proposed corporation. It has no power to grant or refuse or to transfer such license. There may be some question as to the power of the court, under the license laws of the commonwealth, to grant a wholesale or retail license, to a corporation for the sale of spirituous liquors, but this is a question for judicial determination, upon which this department expresses no opinion. All that this opinion is intended to cover is that the purpose stated in the application for this charter is for conducting a lawful business, which is not inhibited by any statute and is within the scope of the amendatory act of 1901.

I, therefore, advise that the application for the charter be approved, and that letters patent issue thereon.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

#### AMOUNT OF CHANGE TO BE CARRIED BY STREET CAR CONDUCTOR.

Passengers about to board street cars who have only bills of large denominations must take care to have them changed before tendering payment for their car fare, according to the decision of the Tennessee Supreme Court in *Knoxville Traction Company v. Wilkeson*, 99 Southwestern Reporter, 992, wherein it was held that a rule of a company fixing \$5 as the limit on the amount of change it will undertake to furnish passengers is reasonable.

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No. 14.

PITTSBURGH, PA., OCTOBER 16, 1907.

## Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

### MOUNT WASHINGTON SAVINGS & TRUST CO., for Use, v. ACRE LAND CO.

#### *Mortgage—Default—Payment of taxes.*

A mortgage provided that on default in payment of taxes the whole mortgage debt should become due. To a scire facias on the mortgage the answer did not deny non payment of taxes but alleged it was a purchase money mortgage and mortgagee had paid back taxes which were owing by plaintiff.

Held, that the provision of the mortgage was binding and no valid defense had been set up.

No. 353 May Term, 1907. Rule ex parte plaintiff for judgment on default of affidavit of defense. Scire facias sur mortgage.

Opinion by KENNEDY, P. J. Filed June 17, 1907.

The affidavit of defense alleged as follows:

#### AFFIDAVIT OF DEFENSE.

Prior to November 2, 1904, the Mount Washington Savings & Trust Company, the plaintiff, acquired from James W. Dickson, sheriff, by deed dated September 10, 1904, certain premises situate in the township of Scott, Allegheny county, Pennsylvania, described in the mortgage on which the scire facias in this case was issued. Thereafter, for the purpose of relieving said Mount Washington Savings & Trust Company from carrying as part of its assets such a considerable quantity of real estate, certain of the officers, directors and stockholders of said trust company organized the defendant company, which took over said described real estate.

That by deed of general warranty, dated November 2, 1904, said trust company conveyed to the Acre Land Company the premi-

ses described in said mortgage, and by the agreement for the sale of the same and the covenants against encumbrances in said deed contained, the said premises were to be free and discharged of all liens and encumbrances.

That in connection with the said sale and conveyance the said Acre Land Company executed and delivered to the said trust company a mortgage on which this scire facias was issued, the same bearing date November 2, 1904, and payable in five years from date, and being given to secure payment of the sum of \$75,000, with the privilege of paying thereon installments of not less than \$1,000. That payments have been made from time to time upon the principal debt secured by said mortgage, so that the amount now due is \$69,650.

That although said real estate was to be conveyed to the defendant free and discharged of all liens and encumbrances, it was, nevertheless, subject to the lien of school taxes owing the township of Scott for the year 1904, amounting to \$191.10, and also road taxes for the year 1904, amounting to \$191.10, which the said trust company was legally obligated to pay, but which it did not pay; and after the purchase of said land by the defendant company, and after said taxes had become delinquent, to-wit, on April 21, 1905, the defendant company made payment of said taxes for the year 1904, amounting in all to \$382.20, and said sum has not been re-paid to the defendant by said Mount Washington Savings & Trust Company, notwithstanding its legal obligation in its agreement of sale and the covenants in said deed, to convey the said premises free and discharged of all liens and encumbrances.

That during the time of said occurrences a number of the stockholders, officers and directors of the said trust company were also stockholders and officers of the defendant, the Acre Land Company. That subsequent thereto, dissention arose, and practically all of the stockholders of the Acre Land Company severed all connection with the said trust company.

That when the taxes for the year 1905 became payable, the same were permitted to remain unpaid until the early part of the

year 1906 and after the same had become delinquent, to-wit, until the 14th day of March, 1906, when they were paid. No objection was raised by reason thereof, nor was any effort made on the part of the plaintiff company to claim that the defendant company had defaulted in any of the provisions of said mortgage.

That in like manner, when the taxes for the year 1906 became due, they were allowed to become delinquent, in accordance with the practice as to the same previously carried out in the two preceding years, and without objection by said trust company.

That while it is true the said taxes were not paid at the time the scire facias in this case was issued, yet at no time was any complaint ever made by any of the officers of said trust company, nor was any notice ever given to any of the officers of the defendant company, or any demand made that said taxes be paid.

That the taxes, which it is charged in the statement filed were delinquent, were duly paid by the defendant company on the 13th day of April, 1907, and no lien of any nature by reason thereof, or for any other reason, remains against the premises described in said mortgage, nor is there any default by the defendant company in any of the terms or conditions thereof.

The defendant company avers that this proceeding is an attempt on the part of the officers of the said trust company to deprive the said defendant company of said lands by reason of a technical violation of a condition of said mortgage, although the security of the said trust company has not been in any way affected or lessened, and to compel the defendant company to pay the amount of said indebtedness long before the same is due. That said proceeding was not begun in good faith, but by reason of the enmity existing between certain of the stockholders of both companies, and that to permit the plaintiff company to enforce a forfeiture, as it is attempting to do, would be in violation of the clear intent and meaning of the said mortgage, the same having been given solely to secure the trust company, and its security having been in no way lessened, but on the contrary, having been increased by reason of the payments of a part of the indebted-

ness secured thereby, and that said forfeiture would be contrary to equity and good conscience, and in violation of the legal and equitable rights of the defendant company.

Plaintiff issued a rule for judgment for want of a sufficient affidavit of defense for the following reasons:

#### REASONS.

1. The affidavit of defense does not deny the averments of the plaintiff's affidavit.
2. The sum of \$382.20 set up by the defendant in its affidavit of defense as having been paid on April 21, 1905, is only valid as a defense pro tanto, and the defendant is, herein above, given full credit therefor.
3. The amount of debt, interest and attorney's fees claimed in plaintiff's affidavit is otherwise admitted.
4. Neither the deed from plaintiff to defendant, the alleged preliminary agreement between plaintiff and defendant, the terms thereof, nor any reference to any record thereof, is disclosed by the affidavit of defense, and the alleged provisions thereof are irrelevant and immaterial.
5. The provisions of the mortgage, as averred in plaintiff's affidavit, are not denied by the affidavit of defense, and the fact of defendant's default at the time of the issuance of the scire facias in this case, to-wit, in the payment of taxes, as averred in the plaintiff's affidavit, is admitted by the affidavit of defense.
6. No valid defense is set up in the affidavit of defense.
7. The allegations in the affidavit of defense of alleged bad faith are vague, indefinite, insufficient and immaterial.

#### OPINION.

This action is to enforce the payment of a debt which, by the terms of the contract on which it is brought, became due. It is not brought to declare or enforce a forfeiture, but is a sci. fa. upon a mortgage under the terms of which the debt was due and payable. *Atkinson v. Walton*, 162 Pa. 219.

It was conceded upon the argument that if the alleged default had been the payment of interest due upon the mortgage, the judgment could not be resisted.

We are unable to see any difference between the failure to pay the taxes, which are required by the terms of the mortgage

to be paid, and the payment of interest. The plaintiff has equal reason to complain of arrears of taxes, if allowed to accumulate, as arrears of interest; and in this case it seems to us that he is only claiming what he is entitled to under the terms of his mortgage, and we have no right to declare nugatory a provision of the mortgage which is now found in almost all the mortgages given and taken in this county, and upon the faith of which we must assume that the plaintiff in this case advanced his money.

We think the affidavit is insufficient to prevent judgment. It is possible that after judgment has been entered, if the execution can be controlled without any injury to the plaintiff, the court may interfere to that extent; but of this we do not now intend to express any opinion.

The rule in this case must be made absolute, and it is so ordered.

For plaintiff, *Patterson, Sterrett & Acheson*.

For defendant, *Rodgers, Blakeley & Calvert*.

### Orphans' Court,

ALLEGHENY COUNTY.

#### In re Estate of WM. H. WEBER, Deceased.

*Lein of debts against decedent's real estate—  
Act of June 14, 1901, P. L. 562.*

The heirs of a decedent are not necessary parties to an action brought under the act of June 14, 1901, P. L. 562, to continue the lien of a debt against decedent's real estate, and it is not necessary that their names shall be entered in the judgment indexes.

No. 77 March Term, 1907.

Opinion by OVER, J. Filed April 29, 1907.

The fund for distribution here is the proceeds of decedent's real estate sold more than two years after his death for the payment of his debts. Some of his creditors who claim to participate in the distribution of the fund brought actions in the courts of common pleas of this county against his administratrix within two years after his death, for the purpose of continuing the lien of their claims against the decedent's real estate, which were indexed when suits

were brought in the judgment indexes of said courts against "Wm. H. Weber, deceased," and "Catherine M. Weber, administratrix."

The act of June 14, 1901, P. L. 562, provides "That no debts of a decedent except they be secured by mortgage or by judgment entered or revived by sci. fa. within five years prior to the death of said decedent shall remain a lien on the real estate of said decedent longer than two years after the death of such debtor, unless an action for the recovery thereof be commenced and be indexed in the judgment indexes as other liens are indexed against such decedent, his heirs, executors or administrators within the period of two years after his death and duly prosecuted to judgment." It is contended that under this act it is necessary to index the action against the decedent's heirs as well as the decedent, his executors or administrators to continue the lien of the claim, and that as the actions brought by these claimants were not so indexed, that they have no lien on the fund.

The 24th section of the act of 1834 P. L. 77, continued the lien of decedent's debts not of record if an action were brought within five years after his death "against his heirs, executors or administrators," and the act of June 8, 1893, limited the period in which suit should be brought to two years. Under the act of 1834 and the prior act of 1797, all that was necessary to continue the lien was to bring the action within the periods designated against the executor or administrator, and after obtaining judgment thereon, before the decedent's land could be levied upon, the heirs had to be brought in by scire facias, and although the heirs were sometimes joined as defendants with the executor or administrator, this was not good practice: *Atherton v. Atherton*, 2 Pa. 112; *Colwell v. Rockwell*, 100 Pa. 133; *Murphy's Appeal*, 8 W. & S. 165.

As under the acts of 1834 and 1891, the bringing of the action alone continued the lien, it was necessary to search the appearance dockets to discover if actions had been instituted and the decedent's real estate was still subject to the lien of his debts after the periods fixed by the statutes. Because of



the great number of actions brought in some of the counties of the state, such a search became in them very burdensome, and to grant some relief it was provided in the act of 1901 that the action must be indexed in the judgment index. It differs from the act of 1834 only in limiting the period in which the action shall be brought to two years, and providing for indexing the names in the judgment indexes. And as under that act the better practice was to bring the action against the administrator or executor without joining the heirs, *Colwell v. Rockwell*, supra, so it is also under the act of 1901, and the heirs not being defendants or named in the action when properly brought, their names could not be entered in the judgment indexes. The purpose of the latter act was to remedy the defects in the prior acts as to notice of the pendency of actions; the entry of the names of the decedent and the administrator or executor in the judgment index is sufficient notice thereof and provides the intended remedy. As the actions on these claims were properly brought and indexed, they were liens upon the land when sold and upon the fund realized from the sale, and distribution must be made to them.

For lien creditors, *D. Reardon and John Reberman, Jr.*

For estate, *Hunter & Ruoff.*

In the case of *Flint v. Chaloupka*, 18 Am. B. R. 293, it is held that a creditor's suit is an action in rem, and not against the debtor personally; his discharge in bankruptcy is no bar thereto.

The right of an appellate court to set aside a finding of the jury, upon the ground that it is contrary to scientific principles, is sustained in *Chybowski v. Bucyrus Co.* (Wis.) 7 L. R. A. (N.S.) 357.

The poles and wires of a long-distance telephone, strung along a public road, are held, in *Hobbs v. Long Distance Teleph. Co.* (Ala.) 7 L. R. A. (N.S.) 87, not to constitute an additional burden which will entitle the fee owner to compensation, unless he shows that there will be an actual and substantial injury to his property.

It has been held, in *re Automobile & Motor Co.*, reported in 18 Am. B. R. 389, that the right of a corporation to make an assessment upon unpaid stock subscriptions passes to its trustee in bankruptcy.

A condition on a transfer issued by a street railway company, that the holder by accepting agrees that, should any controversy arise as to its validity, he will pay fare and call at the company's office for correction, is held, in *Georgia R. & E. Co. v. Baker* (Ga.) 7 L. R. A. (N.S.) 103, to be unreasonable and void.

A parol agreement between two persons to purchase a single tract of land together, or "in partnership," where the purchase is finally made by one of them, who pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him one half thereof on demand, is held, in *Norton v. Brink* (Neb.) 7 L. R. A. (N.S.) 945, not to create a partnership between such persons.

The liability of a railway company for damages sustained by a licensed draymen who had contracts with merchants to haul their freight from the depot to their places of business, where the agent of the railway company, knowing of the existence of such contracts, wilfully and maliciously refused to deliver to the drayman goods of such merchants, notwithstanding orders, oral and written, that he should do so, is sustained in *Southern R. Co. v. Chambers* (Ga.) 7 L. R. A. (N.S.) 926.

The California Supreme Court in the recent case of *Boorberg v. Western Traction Company*, 89 Pacific Reporter, 130 expresses its approval of the doctrine prevailing in many jurisdictions that where property insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk of the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable.

# Pittsburgh Legal Journal

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No. 15.

PITTSBURGH, PA., OCTOBER 23, 1907.

## Orphans' Court, ALLEGHENY COUNTY.

### In re Estate of ERNEST FREY, Deceased.

*Decedent's estate—Heirs—Sale by one to others  
of interest in land—Fraud—Failure to prove  
—Equity.*

The claimant, in his 25th year, against the advice of his father, brothers-in-law and aunts, persisted in selling to them and did sell for \$6,696 his undivided interest in certain real estate which they had inherited jointly. Some months afterward the property was sold by the other heirs at an advance which netted them a profit on his interest of \$7,000. There was no evidence that the heirs to whom he sold had any knowledge of the value of this real estate which they concealed from the claimant or that they were parties to any negotiations for sale with knowledge reserved or information kept from him. The price at which he had sold had been fixed by disinterested experts. Held, there was no evidence of fraud and the claimant had no standing in equity to compel payment to him of his share of the increased price of the sale.

No. 221 September Term, 1907.

Opinion by MILLER, J. Filed October 5, 1907.

Claim is made by William E. Kramer against Albert L. Brahm, one of the representatives, and against certain heirs of the decedent, for the payment to him of the difference between the amount Kramer sold his interest, to his aunts in certain real estate, and the amount they received for it, on the ground that fraud and undue advantage was taken of him; the difference claimed is about \$7,000.

#### THE FACTS.

Ernest Frey, the decedent, grandfather of the claimant, by his last will, after a number of devises authorized his executors, five years from his death, which occurred March 17, 1901, to sell his lot and buildings situate

at the corner of Liberty and Ferry streets, First ward, in the city of Pittsburgh; providing in the eighth clause as follows:

"All the rest and residue of my estate, real, personal or mixed (including the proceeds of the said property at the corner of Liberty and Ferry streets) I devise, will and bequeath unto my daughters, Anna Lotz, Emma Brahm, Clara Frey, and my grandchildren, Augusta Kramer and William Kramer, children of my deceased daughter, Mary Kramer; said Anna Lotz, Emma Brahm and Clara Frey to each take one-fourth thereof, and the said Augusta Kramer and William Kramer together take the remaining one-fourth thereof share and share alike."

He appointed his son, Ernest Frey, his sons-in-law, Louis Kramer, the father of the claimant, and Albert L. Brahm, executors under his will and guardians of his grandchildren, Augusta Kramer and William Kramer.

The only act performed by them as guardians was at No. 6b May Term, 1902, where distribution was made to them upon their agreement as to the share coming to their wards in the first account filed by them as executors; under date of September 30, 1902, the distributees, including claimant, who became of age August 23, 1902, acknowledged receipt in full for their distributive shares. Thereafter this relationship terminated; the two minors being now of age.

Some time in September, 1905, the claimant, who had been married February 7, 1905, and had for some time been engaged in the meat business, determined to end that occupation and take up the study of medicine. He consulted with Albert L. Brahm about mortgaging his interest in the Ferry street property; he was told that in Brahm's opinion he could not do this as his interest was an undivided one.

Shortly thereafter he announced to Brahm that he had determined to sell his interest. He was asked to give the other heirs the first chance; thereupon it was agreed between them that a family conference should be held; this took place about September 15 at the home of the claimant's father; at this meeting there were present, the father; Mrs. Brahm, with her husband; Mrs. Lotz, with her husband; Mrs. Beegle, with her husband, and his sister, Augusta Kramer. The

latter was invited to join in the negotiation but declined for lack of funds.

Kramer told those assembled that he was there to sell his one-eighth interest in this real estate; they all urged against it telling him they did not believe he was qualified to take up the study of medicine and that holding the realty secured him a fixed income; upon his persistence and express determination to dispose of his interest the parties discussed the price, he asking \$10,000, which they thought was too high; thereupon it was mutually agreed between him and them that a valuation should be obtained from the Commonwealth Real Estate Company and from the Real Estate Trust Company, both large and well known institutions dealing in real estate; it was further agreed that he and Mr. Brahm should consult these companies for the purpose of obtaining their valuation or appraisement; in pursuance of this arrangement the next day they went together and interviewed Mr. Binger of the Commonwealth, and Mr. Dixon of the Real Estate Trust Company. Mr. Brahm said in Kramer's presence and in his hearing that they desired a fair and conservative estimate or appraisement on this property for the purpose of enabling some of the heirs to buy out another.

These representatives agreed to make such valuation, and in the course of a few days sent to Mr. Brahm in sealed envelopes their respective estimates; he at once notified the claimant and all the parties and a meeting was held that night at his house, all being present. The letters were opened and read aloud by Mr. Beagle and were then passed around, the claimant having an opportunity to examine the same. The estimate of the Commonwealth Trust Company was \$50,000, and was made, as testified to, by Mr. Binger under the supervision of Mr. Kelly, its president; that of the Real Estate Trust Company was \$57,150, made under the direction of Mr. Dixon; thereupon the claimant suggested that the average of the two valuations would be fair; this was agreed to, and the price fixed for his interest was \$6,696.

A few days later he, with his wife, went to the office of John M. Goehring, Esq., counsel for the estate, executed and delivered the deed which had been prepared

and received from the three purchasers through the hands of Mr. Brahm the total amount of the purchase money.

Some months afterwards the property was sold by the heirs for \$110,000, and the claimant, then in Philadelphia, was informed of that fact by letter from his aunt, Mrs. Brahm. He came to Pittsburgh in February and talked with Mr. Brahm about obtaining from the purchasers a portion of the profit they had realized, and at his request Mr. Brahm called a meeting of the three aunts; nothing was agreed upon; they, or one of them, saying that as he had made the bargain himself they thought it was fair to let it stand. Later he wrote to each a letter, alike in tenor; that to Mrs. Lotz under date of March 23, 1906, containing the following statements:

"Owing to the great amount received for the property above the appraised valuation, making a loss to me of over \$7,000 and knowing that I have barely enough money to see me through school, I thought between you, Aunt Em and Aunt Clara you might be willing to consider my loss and divide some of the profit with me . . . . And also remember that I would not ask this if I were in as good or near as good circumstances as you are in, and further if you were in my position and I in yours whether you would consider this a fair and square deal or proposition. I think I am only asking of you what you would want any other person else to do by your children if they were placed in the same position that I am."

The claimant expressed himself as entirely satisfied at the time the contract was made and when the sale was consummated. He had prior to the sale talked to a number of people on the valuation of the property; he knew it was opposite the Wabash station and was a desirable location. The relations existing between all the parties seems to have been friendly. He had worked for Mr. Brahm in the Diamond Market in the meat business at several different times, ending each with some disagreement, which, however, does not seem to have caused enmity between the parties. His father at the first conference especially pointed out to him the lack of wisdom in his desire to sell his interest, calling his attention to his prior failures and urging him to retain what he had for a fixed income.

No fraud or imposition, in fact, was perpetrated by Brahm or any of the other parties, nor did any relation of trust exist between them when this contract was made, arising out of Brahm's prior appointment as guardian.

OPINION.

Nothing is better settled than that fraud vitiates a contract; the courts will go far to set aside or otherwise rectify a result obtained by imposition, overreaching, undue influence and especially, violation of a trust or confidence relationship.

But when the duties of accounting for and distributing the fund at No. 65-May Term, 1902, had been performed and the minor was of age there no longer existed the relationship of guardian and ward; what Kramer subsequently received prior to the sale of his interest in the real estate was in his own right, a share of rents through the hands of his father who acted for his co-executors in keeping the accounts; there was nothing further to account for as guardian; the original testamentary appointment carried no further duties.

The facts found are based upon claimant's own testimony. He did not ask Brahm's advice as to the propriety of selling; he came to all with the expressed determination to sell and refused the advice proffered that it was not wise to do so; notwithstanding the efforts of his father, of Brahm and of his aunts, he was persistent to receive the money for his interest in this land. He agreed upon the method of fixing the price; was a party to the arrangement by which this was done and himself named the amount.

There is no approach to fraud or bad faith in these appraisements or valuations; it is wholly immaterial what they were called or whether any record was made of them; he had notice of them, saw them. It appears that they were made by the companies themselves through their accredited representatives as the evidence and the signatures to the letters attest.

There was no evidence or offer of evidence tending to show that Brahm or any of the other parties had any knowledge of the value of this real estate which they concealed from Kramer, or that they had placed any value thereon, or that they were parties

to any negotiation with knowledge reserved, of a price or purchaser therefor, in excess of that received by Kramer; nor is there any evidence or offer of evidence that they had information which they ought to have disclosed to him; they owed him no duty which required them to take more care of him than he did of himself.

While Brahm was mistaken in telling Kramer he thought he could not mortgage his undivided interest in the land, there is nothing in the evidence to warrant a finding that this was a fraudulent statement or carried with it an intent to deceive. This opinion is held by many who have no special knowledge on the subject. It was as much the duty of Kramer to find out from competent authority whether this could be done, and was as easy to ascertain, as was his inquiry and discussion of the probable value of this land prior to the time of his sale.

It was wholly immaterial what was asked for the property after Kramer sold it, or what the owners did for the purpose of obtaining a higher price, if there was no fraud perpetrated or imposition practiced upon him in obtaining his interest.

Every opportunity was given him to show an arrangement or prior knowledge or a concealment of material facts in Brahm or any of the others by which imposition might be presumed. Failing to present any evidence or offers of evidence to substantiate his naked allegation of fraud, undue influence or violation of a trust at and prior to his sale, the attempt to bring into the case the subsequent value of this property could have no possible bearing upon the issue as raised.

It may be conceded that gross inadequacy of price is not only suspicious but fraudulent per se as between a guardian and ward; so in any other relationship of trust and confidence where guardian or trustee directly or indirectly profits by the imposition he has practiced: *Eberts v. Eberts*, 55 Pa. 110. The best faith must be observed between parties occupying this relationship: *Will's Appeal*, 10 Harris 332.

But "if the vendor was thoroughly acquainted with every fact which it was necessary for him to know; if he was 21 years of age and of sound mind; if there were no

circumstances which gave the vendee an improper control over him amounting to mental imprisonment; if in short the vendee behaved honestly and the vendor was able to act like a free man with his eyes open, then the one had a right to sell and the other to buy on any terms they saw proper to agree upon. The law will never interfere between the parties themselves to set aside an honest contract which they have voluntarily made." *Davidson v. Little*, 22 Pa. 245; or as stated in *Whelen v. Phillips*, 151 Pa. 312, "in the absence of a trust relation any person *sui juris* may sell upon any sum agreed upon."

Here as in *Jackson's Estate*, 203 Pa. 33: "The vendor is dissatisfied with and repents the bargain he made, but he has no one other than himself to condemn." Kramer was not an heir expectant, the estate was fully vested in him, no one exercised any improper control over him, and he was long past the age when the law made him competent to transact business as he saw fit.

"Inadequacy of price, improvidence, surprise, and mere hardship, none of these, nor all combined, furnishes an adequate reason for a judicial rescission of a contract. For such action something more is demanded—such as fraud, mistake or illegality." *Graham v. Pancoast*, 30 Pa. 89.

This claimant, in his 25th year, against the advice of his father, brothers-in-law and aunts persisted in selling and did sell to them on terms which he himself fixed. In the absence of any color of fraud, or violation of trust, he dealt with them at arms length. He has therefore no standing in a court of equity for relief, and his claim must be dismissed.

It is doubtful whether on the pleadings and record even if the semblance of a case had been made out, relief could have been granted in this proceeding. But the question is not raised; we have accepted the issue as presented and have disposed of the question on its merits.

For claimant, *Campbell*.

For estate, *W. B. Rodgers* and *John M. Goehring*.

## Executive Department,

HARRISBURG.

### STREET RAILWAY STATIONS.

*Street railways — "Station" defined—Act of 1907.*

Electric street railways are included in the act of May 1, 1907, requiring corporations owning, leasing or operating steam or electric railways, and engaged in the business of carrying freight or passengers, to report to the secretary of internal affairs the number of statute miles of lines so operated.

The word "station" in said act, as applied to electric street railways, includes not only such stations as may be established for the receipt and discharge of freight and passengers, but also those points on the lines after passing which an additional fare is charged to passengers.

Request of Superintendent of Bureau of Railways Craig for opinion.

Opinion by Todd, Attorney-General.  
Filed June 5, 1907.

I have your letter of the 4th inst., in which you ask whether, under the act of assembly entitled "An act to require corporations owning, leasing, or operating steam or electric railways, and engaged in the business of carrying freight or passengers, within this state, to report to the secretary of internal affairs the numbers of statute miles of lines so operated; and providing a penalty for failure so to report, and for making an incorrect report," approved May 1, 1907, 1. Electric street railways are included in said act; and 2. What constitutes a station along the line of electric street railways, stopping, as they do, at the street corners in the cities, boroughs, etc.

I answer your first question in the affirmative.

The answer to your second question is not so clear, owing to the somewhat vague language of the act of assembly, but, in view of the fact that one of the purposes of the act is to ascertain the mileage between stations, I am of opinion that the word "station" in the act, as applied to an electric street railway, includes not only such stations as may be established for the receipt and discharge of freight and passengers, but also those points on the lines of railways after passing which an additional fare is charged to passengers.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

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No. 16.

PITTSBURGH, PA., OCTOBER 30, 1907.

## Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

### WEINMAN v. HOCHBERG.

#### *Contract—Sale of real estate—Incumbrance—Tender.*

Under a contract for purchase of real estate which provided that time be of the essence of the contract, no tender of the deed was made on the day appointed in the contract and the purchaser said he would not take the property. A tender of the deed was made a month later, but the property was subject to an easement. Held, in a suit of the purchase money that the purchaser was relieved from the contract and could recover his deposit.

No. 929 August Term, 1904. Motion for new trial, and motion for judgment for plaintiff non obstante veredicto.

Opinion by KENNEDY, P. J. Filed June 17, 1907.

This is an action to recover a balance of purchase money alleged to be due on articles of agreement for the purchase and sale of land, and is in the nature of a bill for specific performance.

By the terms of the contract the plaintiff was to convey by good title in fee to the defendant, and the deed of the premises was to be delivered on April the 1st, 1904, on payment of purchase money and interest; and it was expressly declared therein that time was of the essence of the contract.

On the day upon which the deed was to be delivered and payment made, no deed was tendered by the plaintiff to the defendant, nor, in fact, was there any deed executed and ready for tender; nor was there any deed executed or tendered for a month or more thereafter. The plaintiff at the time was absent from the state and unable to make either the tender or execution at

time named in the contract. His son, as his agent, visited the defendant and inquired in regard to the payment of the purchase money, when he was informed by the defendant that he would not take the property. And although plaintiff's agent received this notice from the defendant, still no tender of deed was made.

Plaintiff's counsel argue that it was the duty of the defendant to tender a payment of the money on the day named, even if there was no tender of the conveyance. We cannot sustain this position. If the defendant was seeking to enforce the contract, he must tender payment and demand the deed; but in this case he gave notice to the plaintiff's agent that he would not take the property, in other words, rescinded the contract, and the plaintiff was equally bound to perform his part of the contract by tendering the deed at the time named if he desired to enforce its provisions.

The provision that time was of the essence of the contract was equally binding on both parties. Besides, it appears from the testimony that there was an incumbrance upon the property at the time when the deed was to be delivered and payment made, viz., an easement in favor of the Penn Fuel Company, and this easement was in existence at the time the deed was subsequently tendered to the defendant, who for this reason alone was then justified in refusing to accept it; and the defendant, if the deed had been tendered on the day named in the contract, would have been justified in refusing to accept it because the title was doubtful and unmarketable, and plaintiff was not in position to demand specific performance.

In any aspect of the case, we do not think the plaintiff was entitled to recover the balance of purchase money under the contract; and we think it equally clear that the defendant was entitled to recover back the portion of the purchase money already paid by him, and hence there was no mistake in directing a verdict and certificate in his favor for the amount so paid.

The case of *Hollenbeck v. Moore*, 32 L. I. 209, seems to be identical with this, the decision there being that "where time is of the essence of the contract and the vendors do not perfect their title in time, the vendee

may rescind the contract and recover back his deposit."

The motion for a new trial is refused.

The motion for judgment non obstante veredicto is refused.

For plaintiff, *Brown & Stewart.*

For defendant, *White, Childs & Scott.*

(Common Pleas No. 3, Allegheny Co.)

## **SLOHEL v. PITTSBURGH COAL COMPANY.**

*Master and servant—Injury—Defective machinery — Proximate cause — Contributory negligence—Non-suit.*

In an action by an employe to recover damages from his employer for personal injuries a non-suit will be granted though there is evidence tending to show that the machine plaintiff was operating was in a defective condition, knowledge of which was chargeable to the defendant through its mine boss, if there was no evidence to show that the jumping back of the machine which resulted indirectly in plaintiff's injury was caused by its defective condition.

An employe who occupies a uselessly dangerous position while operating a machine is guilty of contributory negligence if, injured.

No. 211 August Term, 1906.

Opinion by KENNEDY, P. J. Filed June 17, 1907.

There is nothing in the testimony in this case tending to show that the alleged defect in the coal cutting machine caused the accident and resulting injuries to the plaintiff.

It appears by the testimony that some days before the accident the machine in question was alleged, to one of the machine bosses, viz., the day boss, by one of the operators or workmen to be out of order; but there does not appear to be any statement made at the time as to wherein the machine was out of order. Some days after the plaintiff, along with other workmen, was directed by the mine foreman to work with this machine upon the night turn, and when it was suggested to the night machinery boss later that this machine had been reported out of order, he alleged it was then all right and directed the plaintiff and other men to take the machine and go to work on the night turn. They did so, this

night machinery boss staying with the workmen until the machine was set up and had been cutting for an hour or two, the presumption being that this night machinery boss remained with the workmen for this length of time to see that the machine was in proper working order. He then left, and the men continued to work for some hours, when the accident occurred; the machine, as testified to, jumping back, the chain connected with the machine caught and took off the plaintiff's leg. One of the witnesses, in stating that the machine had been out of order some days previous to the accident, said something about the machine was bent.

This is all we have in the testimony as to the defect in the machine, and there is nothing to show that this alleged defect caused the accident. Indeed we are in utter ignorance, from this testimony, as to what was really the cause of the accident; nor is there any defect shown in the machinery at the time of the accident. We have nothing at all except that the accident occurred by the jumping of the machine, and nothing as to what caused its jumping. Hence there is no negligence shown here upon the part of the defendant company which would render it liable in this action.

In addition to this we have the plaintiff, who had been at work for a year or more for the defendant company and upon machines similar to this one and doing the same kind of work with the machine as he was doing at the time the accident occurred, placing himself in the most dangerous position that could be found while operating the machine, sitting on the side of the frame with his feet in the machine in such position that if an accident occurred he could not possibly escape injury. While at least one of the witnesses testified that he was sitting on the machine in the place usually occupied by the person operating it, yet none of the witnesses testified that it was the habit or custom of the operators to sit with their feet dangling down in the frame, where this plaintiff was at the time of the accident. It is shown that he could have sat on the side of the machine with his feet outside the frame without the same risk or danger as in the position in which this plaintiff placed himself. And, hence, we cannot escape the

conclusion that the plaintiff was himself guilty of contributory negligence.

The motion to take off non-suit must be denied. It is so ordered.

For plaintiff, *W. T. Tredway*.

For defendant, *Elliott Rodgers*.

(Common Pleas No. 3, Allegheny Co.)

## DEVER v. THE PHILADELPHIA COMPANY.

*Natural gas—Distributors of—Rights of customers—Non-payment of bills—Shutting off gas.*

A company supplying natural gas to the public for which bills are rendered monthly may lose its right to shut off the gas for failure of the consumer to pay his monthly bill if it continues the supply and rendering a bill for the whole amount due at the beginning of the next month. If by the company's rules the customer has until the 10th of the month to pay the bill for the preceding month, the company will be liable for damages for turning off the gas on or before that date because of a delinquent payment two months old, gas having been furnished and bills rendered in the meantime.

No. 229 August Term, 1905.

Opinion by EVANS, J. Filed June 15, 1907.

The defendant company is a distributor of natural gas to the public and the plaintiff was a customer of the defendant company. About the 1st of March a bill for the gas used during the month of February, amounting to \$12.69, was sent by the defendant company to the plaintiff. This bill was not paid, and on March 15th a notice marked "Duplicate" and "Final Notice" was sent to the plaintiff with the following note at the bottom: "If not settled on or before March 18, 1905, the supply of natural gas which is being furnished you by this company will be shut off on that date." The gas was not shut off on that date, and about April 1st a bill amounting to \$8.91 for gas used during the month of March was sent to the plaintiff with the following notations: "A discount of 2 cents per 1,000 cu. ft. or \$.66 will be allowed on this bill if paid on or before April 10, 1905. If not then paid the gas may be shut off with-

out further notice." The above notations, except the figures \$.66 and the date April 10, 1905, were in print, and below this in typewriting was the following notation: "Overdue unpaid balance on which there is no discount, \$12.69."

On April 10, 1905, the defendant shut off the supply of gas from plaintiff's house, and this suit is brought to recover damages for breach of the contract. It is admitted that the defendant had no right to shut off the supply of gas because of the non-payment of the gas used during the month of March, because plaintiff had all of the 10th of April to pay that bill and checks in payment of the entire bill were mailed on the 10th day of April and presumably reached the defendant's office on that date.

It is contended for the plaintiff that the failure to turn off the gas in accordance with the notice of March 15th and the notation on the bill for March gas that if the bill be not paid on or before April 10, 1905, the gas may be turned off without further notice, including \$12.69 of the February bill, was a waiver of the right to shut off the gas because of the failure to pay the February gas or an extension of the time to April 10th.

We are inclined to the opinion that this is the effect of the notice sent out about the first of April by the defendant. It will be observed that in the notation of the overdue bill there is special mention that no discount can be allowed on it. It would have been very easy to have also reserved the right to turn off the gas for its non-payment. In no other way is it distinguished from the provisions of the bill for March gas except in the notation which is made that no discount will be allowed on that amount. It would be a natural reading for that notice that the company had seen fit to extend the time for turning off the gas to April 10, 1905. In this view of the case the defendant cannot complain of the error of the court in leaving to the jury the interpretation of the notice of April, 1905.

For plaintiff, *O'Brien & Ashley*.

For defendant, *Reed, Smith, Shaw & Beal*.



**Court of Common Pleas,**

WARREN COUNTY.

**COLUMBUS & ERIE R. CO. v.  
BAKER.***Railroads—Eminent domain—Right of way—  
Act of February 19, 1849, P. L. 83.*

Under the act of February 19, 1849, P. L. 83, railroad companies have the right to project and carry their rights of way the full width of sixty feet, not only on a level, but across the valleys and through the hills at the same width, with such additional amount as is necessary in deep cuts and high embankments, to make the proper slopes, according to good engineering.

As the act limits the amount of land that can be taken by railroad companies to sixty feet in width, "except in the neighborhood of deep cuttings, or high embankments," a cut or embankment that is not more than three feet must be taken as on grade.

No. 13 December Term, 1906. Bill in equity for an injunction.

Opinion by LINDSEY, P. J. Filed November 17, 1906.

This bill was brought by the Columbus and Erie Railroad Company, for the purpose of restraining the defendant, W. W. Baker, from interfering with the construction stakes placed by the employes of the plaintiff company to define its right of way through the defendant's land as claimed by the plaintiff company, and also to restrain the defendant from interfering with the construction of fences along said right of way as claimed by it on each side thereof.

The bill sets out that the Columbus and Erie Railroad Company is organized under the general railroad laws of the commonwealth of Pennsylvania, and in pursuance of its charter of incorporation, and as provided by the laws of the commonwealth, has surveyed, located, and determined its route for a railroad, which passes, inter alia, upon and over a certain tract of land in Freehold township, in the county of Warren, owned or claimed to be owned by the said W. W. Baker, defendant.

A preliminary injunction was granted, and at the hearing, after the taking of testimony, was continued until final hearing, which was had on November 7, 1906, at which time further testimony was taken.

From the bill and answer, and stipulations of counsel, and evidence taken, we find the following facts:

1. The said Columbus and Erie Railroad company, by its officers and employes, has entered upon said portion of said premises appropriated by it for the purpose of building a fence along the lines of the land so appropriated, and for the purpose of proceeding to construct its roadbed thereon, and doing other work incidental and necessary for the building of said railroad.

2. The defendant, W. W. Baker, has removed construction stakes placed by the employes of the plaintiff company upon the land claimed by it outside of a strip sixty feet in width, and has resisted the efforts of the employes of said plaintiff company to build a fence along the lines of the land claimed by it, to wit, a strip of land one hundred and fifteen feet in width, being fifty feet on one side, and sixty-five feet on the other side of a center line, and has threatened to resist any effort to build fences as aforesaid.

3. It was conceded at the trial, that the necessary preliminary steps had been taken by the board of directors of the plaintiff company, in locating and specifying the land as aforesaid sought to be taken.

4. There is an embankment as shown by the testimony of plaintiff's engineers, twelve feet in height at the easterly point of plaintiff company's location of its road through the land of the defendant. This embankment gradually decreases, going westward on plaintiff company's location, until it comes to grade; that, is the grade of the roadbed.

5. There is a cut at the westerly point, or where the plaintiff's road as located leaves the property of the defendant, of from eight to ten feet, according to the testimony of the engineers. This cut gradually decreases in going eastward, on the line of the plaintiff's location, until it reaches grade, and the length of the line on grade between where the cut runs out and the embankment commences, is about three hundred feet.

6. The evidence of the engineers is, that where the embankment is twelve feet in height, it requires three additional feet for every foot of embankment, in order to make

the proper slope to the embankment, which would make thirty-six feet to make the proper slopes at the point where the embankment is twelve feet high. And for every foot in the decrease of the embankment a decrease of three feet in the width of the land at the bottom of the slope, until it runs down to grade. The same thing is true as to the cut. Where the cut is ten feet deep, it requires, according to the engineers, three feet additional land for every foot the cut is deep, and would therefore take thirty feet at the point where the cut is ten feet deep, and would decrease three feet for every foot in the decrease of the cut.

#### LEGAL CONCLUSIONS.

1. The plaintiff company is entitled to sixty feet on grade through and across the defendant's land as located; and beginning where the embankment is twelve feet in height, it is entitled to three additional feet to the sixty feet for every foot in height of the embankment, which makes thirty-six feet additional; making the entire width of the land the plaintiff is entitled to take at that point, ninety-six feet. This width must decrease three feet for every foot of decrease in the embankment, going westward until the grade is reached.

2. Beginning where the cut is ten feet deep, the plaintiff company is entitled to three feet additional to sixty feet in width on grade for every foot in depth of the cut, which makes thirty feet; making the total width of the land that plaintiff is entitled to take at that point, ninety feet. This width must decrease three feet for every foot of decrease in the cut, going eastward, until grade is reached; and between where the cut ceases and the embankment begins, it can take only sixty feet, that is, it can take only sixty feet on grade.

3. An embankment or a cut that is not greater than three feet, must be regarded as on grade.

#### OPINION.

In support of the above legal conclusions, we refer to Sec. 10 of the act of February 19, 1849, P. L. 79, which confines the plaintiff to sixty feet in width, "except in the neighborhood of deep cuttings, or high embankments, or places selected for sidings, turn-outs, depots, engine or water stations."

The legislature recognized the fact that in building railroads through a country broken by high hills and deep ravines, deep cuts and high embankments would be necessary, and that sixty feet in width might not be sufficient at such places.

In the case of *Phila. & Reading R. R. Co. v. Obert*, 109 Pa. 193, while the precise point at issue here was not involved in that case, yet the interpretation placed upon the same language as above quoted seem to give railroad companies the right to project and carry the full width of sixty feet, not only on a level, but across the valleys, and through the hills at the same width, with such additional amount as is necessary in deep cuts and high embankments, to make the proper slopes according to good engineering.

In the case of *Dryden v. Railway Co.*, 208 Pa. 316, Mr. Justice Dean, delivering the opinion, speaking of the act of 1869 relative to the widening of rights of way, on page 323, says: "In this particular it is as definite as the act of 1849, which limits the width to sixty feet, except in the neighborhood of deep cuttings or high embankments. It follows that in such cases the width is only limited by as much more as is necessary for proper construction." In *Zahn v. R. R. Co.*, 184 Pa. 66, speaking of the act of 1849, Mr. Justice Dean says, on page 74, "Under that act it had a right to appropriate, not to exceed sixty feet in width, except where it might take more at deep cuttings, high embankments, or places selected for sidings, turn-outs, depots, engine or water stations."

*Hendler v. Lehigh Valley R. R. Co.*, 209 Pa. 256; *Snee v. R. R. Co.*, 210 Pa. 480, and *Robinson v. R. R. Co.*, 161 Pa. 561, are all authority, as we view them, for the same general principle.

In arriving at the above general conclusions we have not been unmindful of the principle that this act of assembly, as well as others of a like character, is to be construed strictly against the railroad company. It was said in *Woods v. Greensboro Natural Gas Co.*, 204 Pa. 606, by Mr. Justice Potter, quoting from Lewis on Eminent Domain, Sec. 254, "All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more

harsh and peremptory in its exercise and operation than any other." Many other cases to the same effect might be cited, but they are referred to in this recent decision by Mr. Justice Potter.

The language of the act limits the amount of land that can be taken by railroad companies to sixty feet in width, "except in the neighborhood of deep cuttings, or high embankments." Therefore we have found that a cut or embankment that is not more than three feet must be taken as on grade. It would seem, from the evidence of the plaintiff's engineers, that as a matter of fact, a fill not more than three feet in height is regarded as practically on grade.

We also hold that no additional land can be taken for ditching and telegraph poles, for the reason that ditching and telegraph poles would be required on a level or grade, and would have to be set inside the sixty feet allowed by act of assembly in such case; and for the further reason that it is shown in this case, that there would be room for them at the bottom of the slopes, after constructing the roadbed for two tracks.

It is also shown by the engineer for the defendant, a man of long experience as a railroad engineer, and especially in construction, that the fences can be built without additional lands beyond the three feet for every foot of cutting or embankment.

The prothonotary is directed to file these findings and opinion, and enter the following decree nisi, and give notice to the parties or their counsel, and if no exceptions are filed within ten days from this date, the decree entered nisi shall stand as the final decree.

And now, November 17, 1906, this case came on to be heard on final hearing, and after due consideration it is ordered, adjudged, and decreed that the plaintiff company may occupy for the construction of its railroad through and across the defendant's land, sixty feet at grade, and three feet additional, where there is an embankment, for every one foot in height of embankment, and three feet additional, where there is a cut, for every foot of cut. And that the plaintiff company, its officers, agents, and employes, are hereby perpetually enjoined and restrained from taking and using any

more or greater width of land than above designated; and the defendant and his employes are hereby perpetually enjoined and restrained from interfering with the officers, agents, and employes of the plaintiff company in the occupation and use of the land above designated and described. The plaintiff failing to show a right to the land where it was building the fence when interfered with by defendant; it is further ordered, adjudged, and decreed, that the plaintiff company pay the costs of this suit.

For plaintiff, *Hinckley, Rice & Alexander* and *George F. Davenport*.

For defendant, *G. T. Kincaid* and *A. B. Osborne*.

[From Edward Lindsay, Esq., Warren, Pa.]

It has been held, *In re Luber*, 18 Am. B. R. 476, that, on a jury trial of the issues in an involuntary bankruptcy proceeding, where the act of bankruptcy charged is an alleged transfer of property with intent to hinder, delay and defraud creditors, great latitude should be allowed in the admission of evidence as to all the circumstances attending the transaction.

It has been held, *In re Spittler*, 18 Am. B. R. 425, that upon notice by a bankrupt, who was a party to an executory contract, that, because of financial embarrassment, it would be absolutely impossible to carry out the contract on his part, the other party to the contract may treat the contract as broken and may at once prove his claim for damages under section 63a of the Bankruptcy Act, if it may be liquidated under the provisions of section 63b.

In the case of *In re E. S. Wheeler & Co.*, 18 Am. B. R. 421, it has been held that where a trustee brings a suit in a state court against a bank to recover payments alleged to have been made to it by the bankrupt, a corporation, while it was insolvent and in fraud of the rights of its creditors, the president of the bank, upon his examination under section 21a of the Bankruptcy Act, cannot be compelled to produce his private memorandum book, containing only transcripts from the books of the bank relating to transactions with the bankrupt.

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No. 17.

PITTSBURGH, PA., NOVEMBER 6, 1907.

## Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

### McKNIGHT v. PARK et al.

*Oil wells—Operations of—Tenants in common  
—Disagreement—Receiver.*

Where there are several owners of a producing oil well who cannot agree as to the management of the property and there is no probability that they will ever reconcile their differences, it is proper upon the application of one of them for the court to appoint a receiver to manage the property and an account be made between the parties.

No. 504 March Term, 1907. In equity.

Opinion by CARNAHAN, J., specially presiding. Filed June 29, 1907.

The plaintiff and defendants are the owners of an oil and gas lease. They are unable to agree either as to the use and operation of their property or the payment of debts actually incurred in the operation of it. As a consequence, it is claimed that the property is deteriorating in value, and loss of the leasehold is threatened. The plaintiff prays for an account and the appointment of a receiver.

From the bill, answer, testimony taken and evidence we find the following facts:

#### FINDINGS OF FACT.

1. The defendant, J. Ralph Park, by agreement of lease bearing date April 15, 1905, acquired from Ira B. Crawford the exclusive right of operating and drilling for petroleum and gas on forty acres of land owned by said Crawford, situate in Richmond township, Allegheny county, Pa.; and by assignments of said leasehold interest made from time to time thereafter the same vested in and is now held by the parties hereto in the following proportions: Henry McKnight, one-half interest; J.

Ralph Park, defendant, three-sixteenths interest; J. Ralph Park, trustee for W. G. Crawford, defendant, three-sixteenths interest, and A. S. Hunter, one-eighth interest.

2. Said lease provided, in effect, that if three wells were drilled to completion and oil found in paying quantities a fourth well should be commenced within sixty days from the time the third well was drilled in and pushed to completion without delay; and by reason of the alleged failure of the lessees, the plaintiff and defendants herein, to complete a fourth well, according to the terms of said lease, the lessor now threatens legal proceedings to forfeit the same.

3. The parties agreed that the first well on said premises should be drilled by the original lessee, J. Ralph Park, at his own expense, and thereafter the further development and operation of the lease should be conducted jointly by the parties owning the same, under the name of Park Oil Company, and the expense of such development and operation should be paid by said parties in proportion to their respective interests; and the income derived therefrom should be divided among them in the same proportion at the end of each calendar month; and the said enterprise has been developed and operated up to the present time by the different parties in interest under said agreement.

4. The first well was completed and two additional wells were drilled on said leasehold, in which oil was found in paying quantities, and since their completion all three of said wells have been and still are operated by the parties in interest under said agreement; practically all the joint business with the public at large having been carried on under said name of Park Oil Company, under which name supplies were ordered and shipped, indebtedness contracted, bills paid, credit extended by the public, and the accounts of the joint enterprise were kept in books purporting to be the books of said oil company until the time of the disagreements hereafter referred to.

5. For five or six months after said agreement was entered into each of the parties paid his share of the expense of developing and operating said enterprise to J.

Ralph Park, defendant, with the understanding and agreement that the moneys so contributed were to be paid by the said Park to the then existing creditors of said Park Oil Company. Since that time the indebtedness incurred in the operation and development of the business, when discharged at all, has been paid directly to the creditors by the different parties in interest individually.

6. In the development and operation of the joint enterprise each of the parties has paid items of expense for which he is entitled to credit by the others, and no account of same has ever been taken; but plaintiff has paid in the neighborhood of two thousand dollars in excess of his share of said expense.

7. In June, 1906, two of said defendants, Park and Crawford, attempted to discharge the employe who was then pumping the wells on said leasehold, but under plaintiff's direction the said employe continued and still continues to operate the same; but since said time plaintiff and defendants have never been able to agree as to the proper operation of said wells. Defendants deny any liability for their share of the wages due said pumper since June, 1906, and have not paid and refuse to pay any part of said wages for the past eight months.

8. Shortly before said differences arose a fourth well was commenced on said premises and was afterwards drilled into the oil producing sand and within a few feet of completion, under a contract signed by W. G. Crawford, one of the defendants, and acquiesced in by all the other parties in interest, who had full knowledge of the fact that said well was being drilled, and made no objection to the drilling of the same.

9. The drillers refuse to complete said fourth well until an indebtedness of \$1,058.30 due them is paid, and the plaintiff is willing and has offered to pay his part of said indebtedness, but the said Park disclaims liability for any part of the expense of drilling said well on the ground that he never assented thereto.

10. A large indebtedness has been incurred by the parties hereto for labor and materials furnished from time to time, and used in the development and operation of

the said leasehold, and claims against said enterprise in excess of \$1,000, long past due, are now outstanding and unpaid.

11. A number of suits for the recovery of said claims have been entered against the plaintiff and defendants as partners doing business as Park Oil Company, in some of which judgments were secured, from which appeals were taken by the defendants; and numerous other suits are threatened by other creditors, many of which have notified plaintiff that they will hold him responsible for the entire amount of said indebtedness.

12. The production from the said wells in operation on said lease has decreased nearly one-half since their completion and still continues to decrease.

13. The income derived from the oil produced is paid by the purchasing company to the parties directly, according to their respective interests, and is not being applied by the defendants to the liquidation of their portion of the indebtedness.

14. The income from the enterprise at the present time is wholly insufficient to meet the current expenses and also discharge the outstanding indebtedness, and the parties in interest are unwilling or unable to contribute additional capital.

15. The plaintiff and defendants have conferred and have made repeated efforts from time to time to adjust said differences between them, but they are utterly unable to agree, either as to the proportion of said outstanding indebtedness which should be assumed by each, or as to the present or future operation or development of said joint enterprise, or any disposition of the same, and there is no reasonable probability that an agreement as to any of these differences will ever be reached.

#### CONCLUSIONS OF LAW.

The plaintiff and defendants, as respects themselves, own the leasehold as tenants in common. Whether, as respects creditors, they could be treated as partners in the conduct and operation of their business, is not a question for consideration in this proceeding. The plaintiff is entitled to an account showing the amounts contributed by him and the defendants in payment of indebtedness incurred in the operation of their leasehold and the conduct of their business,

and to a decree requiring each of the parties to pay his proportionate share of such indebtedness. *Harrington Bros. v. Florence Oil Co.*, 178 Pa. 414. The act of May 6, 1891, P. L. 41, authorizing actions of assumpsit by and against joint owners, joint tenants and tenants in common holding an interest in and operating any drilling, pumping or producing oil or gas well, does not take away the jurisdiction of courts of equity in a proceeding such as this is, nor has it any application to such a proceeding: *Johnston et al. v. Price et al.*, 172 Pa. 427.

The parties are unable to agree as to the arrangement of their affairs. They have differences as to how their wells should be pumped; they cannot agree upon employees; the defendants refuse to contribute to the payment of the wages of one employe, and the plaintiff refuses to discharge him. This employe refuses to recognize the defendants as having any authority over him and pays no attention to their notice of discharge. There is absolute disagreement between the plaintiff and the defendants as to the management of their property, and it is not probable that they will ever succeed in reconciling their differences. Whether they are partners or not they are more than mere tenants in common. They are not merely holding the property for their common benefit. Their purpose is to utilize and make it productive, but they cannot agree as to how this shall be done. No one of the parties can take possession and proceed with the work; and in the meanwhile opportunities of obtaining proper returns from what would otherwise be a profitable enterprise, are lost.

Under these circumstances we think the case is one for the appointment of a receiver, who should take charge of the leasehold and operate it. A decree should therefore be drawn providing for an account, as above stated, and the appointment of a receiver. An injunction should also issue restraining all parties from collecting accounts or in any manner interfering with the conduct and operation of the leasehold by such receiver.

For plaintiff, *Rodgers, Blakeley & Calvert*.  
For defendants, *Crawford & Sample*.

## Orphans' Court,

ALLEGHENY COUNTY.

[For former opinion in this estate by MILLER, J., see No. 2, page 11 of this volume.]

### In re Estate of DAVID S. WILSON, Deceased.

No. 76 May Term, 1907.

Dissenting opinion by HAWKINS, P. J.  
Filed October 15, 1907.

The real question in this case is whether the letter accompanying Mr. Wilson's so-called "will" imposed a trust on his brother Robert, or was merely precatory in character? The principle by whose application it must be solved is well settled. "There can be no doubt," said Lord Lindley in *Williams v. Williams*, 2 Ch. 12, 18, "that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favor it is to be performed. . . . The term 'precatory' only has reference to forms of expression. Not only in wills, but in daily life, an expression may be imperative in real meaning, although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing but a confidence reposed by one person in another and enforceable in a court of equity." To the same effect is *Fox's Appeal*, 99 Pa. 383. What then was Mr. Wilson's purpose?

It seems very clear that the letter in question in this case must be regarded as a complimentary part of Mr. Wilson's will. While it was written in point of time after the "will" its manifest function was to declare the purpose for which the "will" was made. The "will" vested in his brother the legal title to his estate; the letter explained what disposition should be made of it. They were necessary parts of a contemporaneous scheme of disposition. The introductory and concluding sentences, and the restriction of the brother's beneficial interest in the body of the letter can have no other meaning. He speaks of "my will of

this date," explains why it was written in the form in which it would be found, and declares a purpose which is inconsistent with an absolute residuary gift to his brother. The word "want" in the introductory sentence upon which so much stress has been laid is not necessarily precatory. Its meaning is controlled by its context: *Fox's Appeal*, *supra*; and the context here shows that it was used in a mandatory sense. The brother was told to "give" this, and "pay" that. He was to "let" Mary M. Baird "take," not what he, but she "desired" of chattels, and John C. Wilson, what he "chose" of books and instruments; and of the "balance after the foregoing distribution" he should "keep" for himself "not exceeding \$10,000 and give the rest to Mary M. Baird." The directions in respect of "distribution" are thus plainly peremptory in character. While the "will" in terms gave Robert K. Wilson an absolute estate, the accompanying explanatory letter shows an intent to create a trust for himself and others named; and his voluntary probate of the letter and subsequent conduct imply recognition and acceptance of its terms: *Reed v. Robinson*, 6 W. & S. 329. It is immaterial to the issue here whether or not Mr. Wilson intended this letter to be probated. If it was in substance a testamentary paper he could not have prevented probate by any declaration even though a trained lawyer: *Kelley's Estate*, 200 Pa. 288. The form adopted did not effect his testamentary purpose. The reason, and the only reason, given for that was to save his brother trouble; and his brother assumed the risk of this by his voluntary probate of the letter as part of the will. The letter was signed, was plainly testamentary, and was therefore within the law of probate. But assume it had not been offered in probate, Robert K. Wilson's acceptance under the will with knowledge of the letter would be equally effective to charge him with the trust: *Hoffner's Estate*, 161 Pa. 331. It would have implied a promise to do what the testator commanded and have been enforceable in equity because to the moral, is added the force of a legal, obligation: *Id.* It has been suggested that the rule stated in *Hoffner's Estate*, *supra*, is applicable only to promises

*inter vivos*; but the reason of the rule is equally applicable to the present case. No one can doubt the existence of a moral obligation that Robert K. Wilson would carry out "his brother's" "wishes." Testator trusted (was "assured") he would "try" to do so; and no reason has been suggested why this duty may not be performed. If a moral, why not a legal, obligation? The rule enforced in *Hoffner's Estate* was said to be the expression of a moral law. Testator's letter was surely the equivalent of the written recital by a residuary legatee of a verbal request made by testator, which in *McAuley's Estate*, 184 Pa. 124, was held to raise a valid trust. There is a well settled principle that acceptance of a devise implies a personal assumption of charges on the land devised enforceable in the Orphans' Court; and with all the more reason should he be held to a strict compliance with testator's written instructions in respect of the distribution of this estate. If reference had been made in the will to these instructions no one would have questioned their efficacy, because under the decisions they would constitute part of the will: *Baker's Appeal*, 107 Pa. 381. The fact that conversely the reference is in these contemporary instructions to the will, ought to have the same effect. The place of reference is immaterial; the intent everything.

The case of *Bowlby v. Thunder*, 105 Pa. 173, so much relied on as being an authority against this construction, differs materially in its facts from the present. Testator there vests in his wife an absolute discretion as to carrying out his intention as respects distribution. "It is 'her opinion,' not his, which is to guide and control her disposal of the property. He does not even indicate which children or grandchildren he thinks worthy of consideration. That thought is not suggested. On the contrary the suggestion relates to those only that, in her opinion, 'may prove worthy of her attention.'" In the present case on the other hand testator specifically points out the objects and subjects of his bounty and leaves nothing to discretion.

As the language of the will which was the subject of construction in *Whelan's Estate*, 175 Pa. 23, is not given in the report, the

case has no special value here. The principle that the beneficiary of an absolute gift may not be compelled to comply with a mere request may be conceded; but it has no application here because there is a peremptory direction to do certain things and therefore a trust. Technical rules must yield to manifest intent.

I must therefore dissent from the decree in this case.

(Orphans' Court, Allegheny Co.)

[For former opinion in this estate see Vol. XXXVII, No. 2, page 95.]

**In re Estate of MARGARETHA SIEGWARTH, Deceased.**

*Wills—Construction of—Principal—Income distinguished.*

No. 149 September Term, 1906.

MILLER, J.

The petitioner, Wm. Siegwarth, avers that a mistake was made in the decree awarding to his trustee the sum of \$2,688.37, for the reason that the account shows that, of the balance on hand \$2,951.62 was income, received after his mother's death; that his proportion, one-fifth of this is payable to him presently, and should not have been added to the principal in his trustee's hands for investment.

The provision of his mother's will relating to this share, after directing her estate to be converted into cash and devising the same to her five children, is as follows:

"In respect to the share, part or portion of my estate given to my sons Philip Siegwarth and William Siegwarth, I direct that the same be held by my executors hereinafter named, in trust for my said sons Philip Siegwarth and William Siegwarth, the income and clear annual profit arising from the interest or share hereby given is to be paid to my sons Philip Siegwarth and William Siegwarth, but no part of the principal of said estate is to be given to my said sons Philip Siegwarth and William Siegwarth for five years after my death, and then only when in the judgment of my executors they shall have proven themselves to be entirely competent and qualified to take proper care of the same," etc.

The answer of the trustee admits the facts

as to the amount of income included in the account; he sets up that the entire estate is personalty, and that the share or fifth in which William Siegwarth has a beneficial interest must be regarded wholly as principal to be held in trust, and that William is entitled to the income only on this principal during the trust period.

The testatrix's direction is that to William should be paid "the income and clear annual profit arising from the interest or share hereby given;" if this be not paid beginning with the first year after her death, then her wishes as to his annual receipt thereof are not carried out. During the trust period the corpus of the legacy devised to him is income and clear annual profit; he is entitled to all "that is made from the death of the testatrix for the palpable reason that less would otherwise be got than was given:" *Spangler's Estate*, 9 W. & S. 135.

The rents and interest received by the executor appear to be clear income. Testatrix's manifest intention was that by way of maintenance William should have the income of the one-fifth of her estate from the time of her death; as such it is a gift of an annual sum which commences to run at her death: *Eichelberger's Estate*, 170 Pa. 242, and the beneficiary is not bound to await the transfer of the fund to the trustee, who, as executor, has had the income from the beginning of his trust: *Brown's Estate*, 190 Pa. 464.

Being clearly of the opinion that under the terms of this will and the law applicable thereto, the petitioner is entitled to his share of clear income from his mother's death, and no interest being affected adversely a decree will be granted in accordance with this opinion.

**Court of Common Pleas,**

McKEAN COUNTY.

**SWANSON GROCERY CO. v.  
TERWILLIGER.**

*Sales—Sale of stock of goods in bulk—Act of March 28, 1905, P. L. 62—Fraudulent debtors' attachment.*

The mere issuing of a fraudulent debtors' attach-



ment and a sheriff's return of a person as garnishee who had bought a stock of goods in bulk from the defendant without having complied with the provisions of the act of March 28, 1905, P. L. 62, is not a proceeding against the purchaser to invalidate the sale, within the meaning of the act in question.

No. 19 June Term, 1907; E. D. No. 3 October Term, 1907. Rule to show cause why an issue should not be framed to determine the ownership of goods levied on by the sheriff.

Opinion by BOUTON, P. J. Filed August 5, 1907.

From the record it appears that on February 28, 1907, the plaintiff issued a fraudulent debtors' attachment, under the act of 1869, against the defendant; that under said writ of attachment the sheriff attached certain goods situated in a store building in the borough of Smethport, formerly occupied by the defendant, but at the time of the attachment in the possession and occupancy of R. G. Terry the claimant. Affidavit for the attachment alleges *inter alia*, that the said goods were sold in bulk by the defendant to R. G. Terry in violation of the act of March 28, 1905, P. L. 62, and that the sale is therefore fraudulent as against creditors. The writ of attachment recites that the defendant has property, rights in action, money, and evidence of debt, which he is about to assign, dispose of and remove with intent to defraud his creditors. The sheriff's return shows that he attached the said property in the hands or possession of Ray G. Terry, and summoned him as garnishee; no appearance was entered by the defendant or by R. G. Terry, and nothing further done in the case until May 16, 1907, when the plaintiff took judgment against the defendant, M. B. Terwilliger, by default for want of an appearance. No further move was made in the case until June 3, 1907, when the plaintiff issued writ of *feri facias* against the defendant, which writ was placed in the hands of the sheriff.

On June 10, 1907, the sheriff presented his petition to this court, setting forth, *inter alia*, that he had levied on the said property, and that the same was claimed by the said R. G. Terry, and praying for an issue to determine the ownership between the said claimant, R. G. Terry, and the plaintiff in said execution

under the provisions of the act of May 26, 1897. Whereupon, a rule to show cause was granted; which rule is now the subject of consideration. To said rule the plaintiff Swanson Grocery Company filed an answer alleging that the fraud upon creditors, which was the foundation of the attachment was by reason of the sale of the bulk of the goods to R. G. Terry, without the said Terry as purchaser having complied with the provisions of the act of March 28, 1905.

The petitions further set forth that the said R. G. Terry at the time of the issuing of the attachment admitted to the plaintiff company that he had purchased the goods levied on in bulk from the said defendant, and had not requested or received a written list of the creditors or given the notice required by the said act. To this answer the claimant R. G. Terry demurred. The chief ground of contention is that as no proceedings to invalidate the sale were brought either in law or equity against the purchaser within the prescribed time for bringing such proceedings under the act of March 28, 1905, the plaintiff is barred from now proceeding to set aside the sale made by the defendant to the claimant on the grounds that it was fraudulent as to creditors. There are other grounds of demurrer set forth, but this in our opinion is the sole question worthy of consideration.

The first section of the act provides "that the sale in bulk of the whole or a large part of a stock of merchandise and fixtures, or merchandise or fixtures, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, shall be deemed fraudulent and voidable as against the creditors of the seller, unless the purchaser shall in good faith and for the purpose of giving the notice herein required, make inquiry of the seller and receive from him a list in writing of the names and places of residence or business of each, and all of his creditors, and unless the purchaser shall at least five days before the consummation of the sale give personal notice of said proposed sale to each of the creditors of the seller, as appearing on said list, or use reasonable diligence to cause personal notice to be given to them . . . provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate

any such sale after the expiration of ninety days from the consummation thereof."

The chief question here is, was the action brought against R. G. Terry the purchaser to invalidate the sale within ninety days from its consummation? According to the plaintiff's answer to the rule the sale was consummated on or about February 23, 1907. The plaintiff contends that the issuing of the fraudulent debtors' attachment was a beginning of such proceedings against the claimant. With this contention we are forced to disagree. The fraudulent debtors' attachment was against M. B. Terwilliger and no one else. The claimant Terry was not made a defendant, neither was he made garnishee in the writ. The sheriff found the goods in his possession, returns that he read the writ to him and summoned him as garnishee. No where in the writ is there any notice that the defendant has sold or disposed of his property with intent to defraud his creditors; neither is there any allegation in the writ that the defendant has sold his property in bulk without complying with the act of 1905. But the writ recites, "Whereas, William M. Swanson hath made affidavit that M. B. Terwilliger is justly indebted to Swanson Grocery Company a corporation, in the sum of \$170.63 cents, and that the said M. B. Terwilliger has property, rights in action, money, and evidences of debt, which he is about to assign, dispose of, and remove with intent to defraud his creditors, Swanson Grocery Company, a corporation."

This writ was certainly no notice to Terry that the plaintiff claimed the right to attach the goods because of a fraudulent sale made by Terwilliger to him. The sheriff, when he found the goods in the possession of Terry, claimed by him to have been purchased of the defendant, could have applied to the court for an issue to determine the ownership; had he done so within the period of ninety days from the consummation of the sale and had a rule to show cause why an issue should not be framed been served upon the claimant within said ninety days, we are of opinion that that would have been a commencement of proceedings against the claimant to determine the ownership. Or had he obtained judgment, issued execution, and had a levy by the sheriff been made upon said goods,

and petition then made by the sheriff for an issue and rule to show cause granted and served on the claimant within the period of 90 days from the consummation of the sale, then action against claimant would have been commenced to determine the ownership within the statutory period. There is no doubt in our mind that proceeding by fraudulent debtor attachment is a proper proceeding; but until such time as some process is issued in which the claimant is made a party and in which he is notified, or by reason of the nature of the proceedings would be bound to take notice, that the sale to him is attacked, there is no proceeding brought against him to invalidate the sale; *Wilson v. Edwards*, 32 Pa. Super. Ct. 295.

The sale was good as against the seller and as against all the world except creditors, and can only be avoided by them upon compliance with the provisions of the statute; if they all to commence proceedings against the purchaser to invalidate the sale within the statutory period of ninety days, they cannot afterwards be heard to question its validity. In this case such proceedings were not commenced against the purchaser within the time limited by the statute.

And, now, to wit, August 5, 1907, for the reasons above given the demurrer is sustained, the rule to show cause is discharged, and the sheriff ordered to withdraw from the property and surrender the custody of the same to the claimant.

For plaintiff, *Gorton & Richmond*.

For R. G. Terry, *Allan, Oviatt, Oallup & Bouton*.

[From John N. Apple, Esq., Smethport, Pa.]

## Court of Common Pleas,

DAUPHIN COUNTY.

### HARTZELL'S NOMINATION.

*Election law—Nomination papers—Representative—Number of signers—Rule of computation—Illegal vouching.*

In the case of the nomination of H. for representative in the general assembly for the First representative district in the county of Lehigh by nomination papers duly filed in 1906, Held, that the vote cast at the municipal election, held in

February, 1906, must be taken for the purpose of ascertaining whether the number of signers on the nomination papers was sufficient.

Where the name of the Lincoln party was used in nomination papers in violation of the statute, the court was powerless to make an order in reference thereto in the absence of objection filed.

Where one voucher saw only thirty out of the two hundred and ten sign the nomination papers; another only fifty-four, and another very few, if any, and none were acquainted with the handwriting of any, the papers were held defective.

No. 134 January Term, 1907. Objections to nomination papers.

Opinion by CAPP, J. Filed October 20, 1906.

These nomination papers purport to nominate Rein K. Hartzell as the candidate representing the Lincoln party for representative in the general assembly of Pennsylvania, for the First representative district in the county of Lehigh. This representative district was created by the representative appointment act approved February 15, 1906, and consists of the city of Allentown in the county of Lehigh; and in accordance with the ruling in *re Warren Worth Bailey's Nom. Papers* (Blake's Nom., 32 Pa. C. C. R. 628), the vote cast at the municipal election held in February, 1906, must be taken for the purpose of ascertaining whether the number of signers on these papers is sufficient. At this election three thousand three hundred and thirty-four was the largest entire vote cast for the city assessor, the officer elected, and as the number of names on these papers aggregates two hundred and ten, they are considerably in excess of the required number. Wherefore this objection must be dismissed.

From an examination of these papers, it also appears that the name of the Lincoln party is used in violation of the provisions of the statute, but as none of the objections raises this question, we are powerless in this proceeding to make any order in reference thereto. *McJunkin and Dight's Nom.*, 32 Pa. C. C. R. 662.

The several other objections necessary to be passed upon relate to the qualification of the vouchers, and must be sustained. Patrick R. Brown, one of the vouchers, saw but about thirty of the two hundred and ten affix their signatures, and is acquainted

with the handwriting of none of them. George A. Ruhmel, another voucher, saw but fifty-four of the two hundred and ten signers affix their signatures, and he is not acquainted with the handwriting of any of the others. George L. Smith, another of the vouchers, saw very few, if any, of the signers affix their names, and is acquainted with the handwriting of none of them. He says when he signed the vouchers' affidavit he did not intend to vouch for anybody, but thought he was merely making affidavit to his own signature. These facts compel us to sustain the several objections, which complain that these people are not legally vouched for.

Wherefore this certificate is adjudged defective, and unless amended by being vouched for as required by law within two days will be adjudged invalid.

For objections, *F. G. Lewis, H. Shoemaker and Geo. R. Barnett.*

Contra, *Snodgrass & Snodgrass and J. L. Schaadt.*

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

A corporation which purchases the franchises and property of another corporation at an agreed price per share is, according to the decision of the Missouri Supreme Court in *Hageman v. Southern Electric R. Co.*, 100 Southwestern Reporter, 1081, not liable to the creditors of the corporation whose franchises and property have been purchased for debts which were not liens on the property at the time of the transfer.

Justice Rugg, of the Supreme Judicial Court of Massachusetts, writing the opinion in *Elliott v. Baker*, 80 Northeastern Reporter 450, severely scores the practice of directors of a corporation, as disclosed in that case, to issue stock to confederates, by which they expected to gain control of the corporation. He says the directors of a corporation act in a strictly fiduciary capacity, and they cannot manipulate the property of which they have control, primarily with the intent to secure the majority of the stock or of directors in any particular interest. Such action is not a fair exercise of the power with which they are clothed.

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No. 18.

PITTSBURGH, PA., NOVEMBER 13, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

SINGER et al. v. PRATT et al.

### Ground rents—Statute of limitations—Payments

Under the statute of limitations of April 27, 1855, as to ground rents the payment of the rent to parties not the real owners is not a payment which prevents the renewing of the statute in a suit by the actual owner.

No. 769 April Term, 1907. Sur rule for judgment for defendant non obstante veredicto.

Opinion by FRAZER, P. J. Filed June 25, 1907.

This action was to recover forty-six annual installments of ground rent of \$22.50 each with interest thereon, amounting in all to \$1,428, reserved in a deed made by Peter Mowry to Daniel Pratt, dated December 10, 1806, and recorded in the recorder's office of Allegheny county in Deed Book Vol. 14, page 248, for a lot of ground fronting 22½ feet on Third avenue and running back 84½ feet. The facts are undisputed and are as follows: Peter Mowry created the rent in question by an ordinary deed of perpetual lease, dated December 10, 1806, and devised the annuity, inter alia, to his wife, Elizabeth A. Mowry, and their four sons as tenants in common. By deeds of partition, the rent subsequently vested in George Ross Mowry, one of the sons, in severalty, and by the terms of the will of George Ross Mowry, who died in 1861, it vested in plaintiffs. Elizabeth A. Mowry, the wife of Peter Mowry, died in 1872, leaving a will by which she devised "my ground rents in the city of Pittsburgh, amounting to \$100 per annum, unto my executors in trust to pay the income thereof to Mary Nightingale, during her life, and at her decease to pay

and assign the same to the Orphans' Asylum of Pittsburgh and Allegheny." The ground rent in question was paid to Elizabeth A. Mowry during her lifetime and after her death to Mary Nightingale until her death in 1872, and from that time until May, 15, 1906, to the Protestant Orphan Asylum of Pittsburgh and Allegheny. There was no conveyance or assignment of it, however, to either of the parties named. On May 15, 1906, a deed was made by the Orphan Asylum to the owner of the land, which deed recited that Elizabeth A. Mowry in her lifetime became seized of the rent in question, that it vested in her by the clause in the will of Peter Mowry above referred to, and has been paid "up to and including May 15, 1906, without objection to, adverse claim or demand from any person or persons whatsoever," and that the purpose of the deed was to extinguish the rent forever. Since May 15, 1906, no rent has been paid. The question for determination is whether the rent in question has been extinguished by the statute of limitations. The seventh section of the act of April 27, 1855, P. L. 369, provides as follows: "In all cases where no payment, claim or demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable."

Under the act quoted, the natural presumption of payment after a lapse of twenty-one years becomes a presumption of law, and unless it appears that there was within twenty-one years either a payment or demand or a declaration or acknowledgment of the existence of the rent, the "annuity or charge shall thereafter be irrecoverable." It is admitted that no claim or demand was made by plaintiffs or by any person upon their behalf for payment of the charge since the year 1865, nor was any acknowledgment made to plaintiffs or any one for them of the existence of the charge. Therefore, unless the payments made to Mary Nightingale

gale and the Orphans' Asylum of Pittsburgh and Allegheny are sufficient to prevent an extinguishment, judgment must be entered for defendant. Those payments did not, in our opinion, have that effect. They were not made to plaintiffs nor their agent, nor were they intended to inure to their benefit, and, under the circumstances, we think, did not by operation of law inure to their benefit. If the amounts paid to the Orphan Asylum by the owners of the land are to be treated as "payments" of the charge, then there is nothing due plaintiffs. We are unable to see how the "payments" to others than plaintiffs can operate to prevent an extinguishment of the rent and not be treated as a settlement of the debt. Neither can they be treated as acknowledgments for the plaintiffs' benefit. An acknowledgment, to take a personal action out of the statute, must be made to a party in interest or his agent or at least be intended to inure to his benefit. Such was not the case here. While this case is not in all respects analogous to the personal actions referred to, the principle is the same.

And now, June 25, 1907, rule absolute, and it is ordered that judgment be entered for defendants, non obstante veredico.

For plaintiff, *F. P. Sproul*.

For defendant, *Leander Trautman and Patterson, Sterrett & Acheson*.

(Common Pleas No. 2, Allegheny Co.)

### **NOREN v. STAR ENAMELING & STAMPING CO.**

*Corporations—Dividends—Agreement to take in additional stock.*

In an action by a stockholder to recover a dividend, an affidavit of defense alleging an agreement on part of plaintiff and others to allow their dividends to accumulate for benefit of the company and take additional stock therefor, is sufficient.

No. 512 April Term, 1907. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed April 27, 1907.

The action is against the defendant, a company incorporated under the laws of

the state of New Jersey, having offices in Allegheny county, for a dividend duly declared by that company, which the company refuses to pay to the plaintiff. The affidavit of defense admits all the statements of the affidavit of claim, and sets up that the plaintiff and two other stockholders of the company entered into an agreement with one another for the benefit of the company, by which each of said persons agreed that they would allow their dividends to remain in the company to strengthen its credit and to increase its capital, and that the dividends should be credited upon additional stock to be taken for each of the parties, and that these three persons, including the plaintiff, at that time owned a controlling interest in the stock of the company, their holdings amounting to three-fourths of the capital stock, and that they were the active officers and managers of the company; that these three stockholders had jointly guaranteed certain results to purchasers of stock of the company, and agreed to buy back their stock at certain rates within two years from December 30, 1905; a copy of which agreement is annexed to the affidavit of defense; and that the agreement not to take out the dividends from the company but to leave the same in its treasury and receive stock therefor, was made between these three persons as a part of their joint contract with the persons to whom stock was sold, and in support thereof. Plaintiff admits that the mutual promises of the parties is a sufficient consideration for the agreement, but claims that as the company is not a party to the agreement it cannot set it up as a defense. The contract being made between the parties for the benefit of the company, we have no doubt that the company is entitled to take advantage of it, either by bringing an action thereon if necessary, or by setting it up as a defense.

The rule is therefore discharged.

For plaintiff, *Castle & Jarvis*.

For defendant, *W. J. Brennan*.

The right of a parent to sue a child for support is denied in *Duffy v. Yordi* (Cal.) 4 L. R. A. (N.S.) 1159, where another child is furnishing the support already.

**Orphans' Court,**

ALLEGHENY COUNTY.

**In re Estate of MARY TEGETOFF  
Deceased.***Collateral inheritance tax—Bastard.*

A legacy to a bastard grandson is not liable for collateral inheritance tax.

No. 20 September Term, 1907.

HAWKINS, P. J.

## STATEMENT.

The question involved in this case is whether or not a legatee born out of lawful wedlock takes under his maternal grandmother's will free from collateral inheritance tax.

The facts are these:

Mary Tegetoff died in 1905, leaving a will in which she gave a legacy of \$1,000 to her "grandson," John Tegetoff, natural son of her daughter Katie. The commonwealth claims that this legacy is liable to collateral inheritance tax because the legatee was not "born in lawful wedlock" under the act of 1887; to which it is objected that under the act of 1901, as amended by the act of 1903, he is entitled to exemption.

OPINION. Filed September 24, 1907.

The commonwealth's claim must be rejected. While it is true that the act of 1887 restricted exemption from the tax to children born in lawful wedlock, the acts of 1901 and 1903 legitimated bastards and gave them the same rights and privileges as those born in lawful wedlock so far as the mother and her heirs are concerned and the "privilege" of exemption from this tax which belongs to children born in lawful wedlock in such case necessarily belongs to them: *Killam v. Killam*, 39 Pa. 120. It is suggested that the liability of adopted children for the tax furnishes an analogy which this court must follow; but the ground upon which that liability was rested was that they had no claim of blood, while here the grandson is so in fact, and the policy of the law is to encourage the recognition of such natural right: *Com. v. Gilkeson*, 18 Superior Ct. 516.

For accountant, *F. S. Bennett*.

For commonwealth, *Wm. M. Benham*.

**Court of Common Pleas,**

FAYETTE COUNTY.

**GREENSBORO GAS CO. v. THE  
HOME OIL & GAS CO.***Corporations—Directors—Meetings—Quorum  
—Contract—Ratification.*

Where the by-laws of a corporation provide that a quorum for a legal meeting of the directors shall consist of a specified number of the directors, a contract authorized at a meeting where such number of directors is not present is illegal and not binding upon the corporation.

Acts done, or permitted to be done by individual directors or stockholders, will not be construed as a ratification of an illegal contract not binding upon the corporation, where such acts have never been brought to the attention of either the stockholders or the directors.

No. 498, in equity. Bill for preliminary injunction.

Opinion by UMBEL, J. Filed July 30, 1907.

From the testimony and offers submitted we make the following:

## FINDINGS OF FACT.

1. The two gas companies in interest in this case are corporations created, existing and operating under and by virtue of the laws of the commonwealth of Pennsylvania for the purpose of producing and handling natural gas commercially, and it is not questioned but that for such purpose they are both vested with the right to do and perform all legal acts necessarily incident thereto.

2. The plaintiff has been operating for a number of years producing natural gas and marketing it for light and fuel over an extended territory including portions of Fayette and other counties in the western part of Pennsylvania. The operations of the defendant company are of recent date—charter granted April 27, 1906—and have been limited to leasing territory drilling and testing for oil and natural gas, except as hereinafter set forth regarding the marketing of the natural gas produced.

Among the farms leased by the defendant company on which wells are sunk were the John Black and J. C. Huhn farms in Nicholson township, Fayette county, Pa., on

both of which "gas was struck," and a flow secured of sufficient quantity to be considered of commercial value and soon thereafter negotiations were opened with the plaintiff and at least one other operating natural gas company with a view of making sale of the natural gas produced from the Black and Huhn wells.

3. After some brief preliminaries by telephone and otherwise between employes or representatives of the respective companies a formal meeting was arranged and held at Smithfield, Fayette county, Pa., the place of the principal offices of the defendant company on October 13, 1906, attended by the vice-president and right of way man of the plaintiff, by a representative of the Fayette County Gas Company, and by several members of the board of directors of the defendant company. Minutes of which meeting are regularly entered in the minute book of the defendant company.

At this meeting the plaintiff through its vice-president submitted a proposition agreeing, *inter alia*, to purchase and "take all the gas produced by these two wells delivered through meter at the well or wells at line pressure of Greensboro Gas Company for the consideration of four (4) cents per thousand cubic feet" (Plaintiff's Exhibit "A"). A proposition was also submitted by the Fayette County Gas Company, offering three (3) cents per thousand cubic feet. After discussion of the matter, notwithstanding there was opposition from some of the members of the board of directors of the defendant company, a majority of those present seemed to favor accepting the proposition of the plaintiff and its written proposition is endorsed accordingly as follows, *viz.*: "Excepted October 13, 1906, Home Oil and Gas Company, O. J. Stewart, president;" and we find noted in the minutes of the meeting as follows, *viz.*:

"The directors after hearing the proposition of both companies thought the best thing to do was to appoint a committee consisting of Wm. W. Parshall, H. R. Sackett, and E. H. Reppert to make an agreement with the Greensboro company and report to a future meeting."

After some correspondence and a meeting or two between representatives of the plaintiff and members of the proposed committee

the contract of October 29, 1906 (Plaintiff's Exhibit "D") was prepared and signed by the proper officers of the two companies, in pursuance of which the plaintiff built a connecting pipe line, placed a meter and turned the gas from the Black and Huhn wells into its main on or about November 2, 1906, which connection was maintained and the gas from the said wells taken without interruption until on or about December 15, 1906.

At the time of the signing of the paper dated October 29, 1906, there was discussion regarding the probable production of the said two wells and the impression seems to have prevailed that it would likely be in the neighborhood of at least 1,000,000 cubic feet per day, and statements of the vice-president of the plaintiff company were at least partially responsible for such impression, and but little seems to have happened to disturb such belief until receipt of plaintiff company's check about December 13, 1906 (Plaintiff's Exhibit "L") for \$190.71 in payment for 4,767,783 cubic feet of gas used during November, 1906 (Plaintiff's Exhibit "K.") Whereupon the check was returned forthwith to the plaintiff company by the secretary of the defendant company, at the same time advising, under date of December 13, 1906, that the defendant company did not recognize as legal the contract of October 29, 1906, and declining to do further business with the plaintiff until a legal contract should be made (Plaintiff's Exhibit "M.") Replying to which the plaintiff under date of December 19, 1906, says, *inter alia*, "We are greatly surprised at the position you take. The contract we have with you is most assuredly a legal contract, and we shall insist upon our rights under it. The contract was made after full discussion of the very terms which you seem to object to. It was duly executed under the seal of your company, by your president and secretary, who undoubtedly had authority to execute the same. After being executed your company acted under the same circumstances which would amount to a ratification if there was no prior authority" (Plaintiff's Exhibit "G").

Between December 15 and 20, 1906, the gas was turned off several times by the de-

defendant company or at its instance and prevented from flowing through the said meter and into the mains of the plaintiff and was as often turned on by or at the instance of the plaintiff, until on the last named date, Jesse Stewart and Alcymus Stum, the individual defendants, disconnected the line from the said wells by taking out and removing a joint of pipe, which was restored and the gas again turned on and the plaintiff filed its bill in this case averring practically as herein set forth, praying for an injunction to restrain "the defendant company from selling or in any manner disposing of the gas from the Black and Huhn wells or any interest in said gas to any other person or persons other than the plaintiff or from in any manner encumbering the same;" and also to restrain the defendants from interfering with the plaintiff in obtaining the gas from said wells and from interfering or tampering with the connections and appliances used for the purpose of obtaining the same. Preliminary injunction was granted accordingly and it is now before us on motion to dissolve.

#### CONCLUSIONS OF LAW.

There are only two important questions for determination in this case, viz.:

First. Was the meeting of the board of directors of the defendant company held October 13, 1906, a legal meeting attended by a quorum, and would the defendant company be bound by action taken at such meeting?

Second. If a quorum were not present at the meeting of October 13, 1906, did the defendant company by act, acquiescence, or otherwise ratify what was done or attempted to be done by the directors who were present at that meeting?

#### I.

Section 2 of the by-laws of the defendant company provides as follows, viz.:

"The directors of this company shall manage the business of the company. Eight directors properly convened shall constitute a quorum. No motion, resolution nor agreement, nor bills paid shall be binding on this company until approved by a majority vote of the board of directors in a meeting for the transaction of business and the vote recorded in the minutes of said meeting."

The minutes of the meeting of October 13, 1906, name but seven directors of the defendant company as having been present, which would not constitute a quorum; and under the law and the aforesaid by-law of the defendant company any matters requiring action of the board of directors acted upon by them, would not be binding on the defendant company.

It is insisted on the part of the plaintiff that in consequence of the application for a charter of the defendant company setting forth that Daniel P. Morgan was one of its directors and the aforesaid by-laws providing that the secretary must be a director, and the minutes of the said meeting being signed by him as secretary, we are warranted in presuming that he was a director at that time and that he was present at that meeting; but against this is the plain statement in the minutes that he was not present, naming a secretary pro tem, who doubtless furnished Mr. Morgan with the data from which he wrote up the minutes.

An examination of the minutes of other meetings of the board of directors of the defendant company develops the same condition, viz.: that while he was not in attendance at the meeting, he signs the minutes as secretary of the company; so instead of presuming that he was present on October 13, 1906, we are convinced and find that he was absent on the occasion of such meeting and it is therefore of no consequence, so far as the question in hand is concerned, whether he is a member of the board of directors or not.

It is further insisted on the part of the plaintiff that the testimony of J. C. Huhn, a director of the defendant company, warrants the conclusion that he was present at the meeting, October 13, 1906, although his name does not appear in the minutes as having been in attendance. The answer of the witness chiefly relied on by the plaintiff to establish this contention was not responsive to the question asked, and gave no date, but only said he was present at a meeting in the hall of Smithfield before the gas was sold, when Mr. Parshall and Mr. Sackett were appointed to hunt a buyer for their gas, and that he knew no quorum was present.

If Mr. Parshall and Mr. Sackett were ever



so appointed, it does not appear in the minutes and consequently must have been done informally, when there was not a quorum present and no minute made of the matter. The names of Mr. Parshall and Mr. Sackett appear in the minutes of October 13, 1906, in connection with the proposed appointment of a committee, with duties however widely different from those mentioned by Huhn in his testimony. As set forth in Finding of Fact No. 3 above, the minutes do not state that the parties named were then, nor at any other time actually appointed such committee, it is but little if any more than an expression of opinion of the directors present as to what, in their judgment, was the best thing to do regarding the matter under consideration and we do not think we transgress nor go beyond what the facts warrant in concluding that doubtless the reason the appointment was not clearly and formally made was because a quorum was not present.

It appears in the testimony that on the occasion of the meeting of October 13, 1906, the signature of the said Mr. Huhn was desired to a certain paper which, if he had been present he could and doubtless would have signed then and there; but it was not gotten in that way, but was secured by some one leaving the meeting and after an absence of some time returning with the paper signed by Mr. Huhn.

Therefore instead of there being a quorum of the board of directors of the defendant company present at the meeting of October 13, 1906, we find as a matter of fact in this connection, that there was not a quorum, and conclude as a matter of law that nothing done or attempted to be done, requiring the action of the board of directors, by the directors present on that occasion would be binding on the defendant company, but on the contrary would be null and void unless thereafter ratified by the proper authorities of the defendant company according to law.

## II.

While the plaintiff argues and insists that a quorum was present at the meeting October 13, 1906, yet it is urged with more earnestness that, regardless of that fact, the defendant company unquestionably accepted and ratified the contract of October 29, 1906.

What do we understand by ratification?

Bouvier's Law Dictionary says, "Ratification is an agreement to adopt an act performed by another for us. Express ratifications are those made in express and direct terms of assent; implied ratifications are such as the law presumes from the acts of the principal."

According to the Century Dictionary, ratification in law "is the adoption by a person, as binding upon himself, of an act previously done in his name or on his behalf, or in such relation that he may claim it as done for his benefit, although done under such circumstances as would not bind him except by his subsequent consent. Intention to ratify is not necessary in order to constitute ratification, for an acceptance of the results of the act may itself be conclusive upon the party. But a knowledge of all the material circumstances is usually necessary in order to make a ratification binding."

It is not claimed in this case that there was an express ratification, but it is earnestly contended, that while the substantial or material results of the contract in the shape of receiving pay for the gas actually used were never accepted, yet the acts of the defendant company warrant us in finding and holding that there was an implied ratification. The acts chiefly relied on in that regard are,

1. Pursuant to the provisions of the contract of October 29, 1906, certain of the stockholders or directors of the defendant company negotiated certain rights of way necessary in laying the pipe line from plaintiff's mains to the said wells, which said rights of way were paid for by funds of the defendant company.

2. Permitting and encouraging the plaintiff to expend over \$2,200 in laying said pipe line, placing meter, etc., to convey and measure the said gas.

3. Hiring and paying a man to look after and read the meter, and make a record thereof at stated periods.

4. Permitting the gas to be turned on and run through the said meter and into the mains of the plaintiff for more than a month without objection.

So far as the facts in the above averments are concerned, it is not questioned but that

the acts referred to were performed; it is argued, however, on the part of the defendant company, that each, all, and every of the said acts was the act of one or more of the individual stockholders or directors of the defendant company and that none of them were ever brought properly and legally to the notice of the board of directors, and there is no evidence to the contrary.

Under the law and the by-laws of the defendant company, the board of directors "shall manage the business of the company," and in our opinion, under circumstances such as are here relied on, in order to avail and establish ratification, more is necessary than merely to show that certain acts or matters were permitted or approved by individual stockholders or directors. In such cases, ratification must be by formal action of the board of directors, or by such acts as would warrant us in presuming that the defendant company, by its proper authorities, accepted the contract of October 29, 1906. Purchasing and paying for right of way, hiring and paying the man to read the meter could not properly be done by any individual or officer of the defendant company. Such matters are for the action of the board of directors, and without its sanction, express or implied, would not be binding; and there is in this case, no evidence of action or ratification regarding these matters, consequently we cannot give them the force claimed for them by the plaintiff, in establishing an implied ratification of the contract of October 29, 1906.

It is further urged on the part of the plaintiff that even if there was no formal action of the board of directors of the defendant company, approving and ratifying the contract of October 29, 1906, that the minutes of the meeting of October 13, 1906, duly entered in the minute book was sufficient notice to the defendant company of what was then done or attempted to be done, and would be binding unless steps were taken promptly to rescind, which contention we cannot approve, the record does not disclose that it was ever brought to the attention of the board of directors of the defendant company and as a matter of fact there does not appear to have been a meeting of such board between October 13, 1906, and the

date of the filing of the bill in this case, December 27, 1906. If there had been a meeting of the said board of directors after October 13, 1906, attended by a quorum, and the minutes of the meeting of October 13, 1906, read and approved, then we think there would be more force in the contention of the plaintiff.

Another consideration, the limitations set forth in the above definition from the Century Dictionary to the effect that "a knowledge of all the material circumstances is usually necessary in order to make a ratification binding," is we believe generally recognized as just and a correct statement of the law; to hold otherwise would be unjust and most dangerous, as it might enable unscrupulous and designing persons by strategy or deception to secure the ratification of contract that would possibly operate to the serious injury if not ruin of the party that otherwise could and would not be bound by its terms.

A rule recognized in this state is as follows, viz.: "Ratification of an unauthorized act of an agent must, to be valid, be the voluntary act of the principal, he at the time of the supposed ratification being informed of all material facts and circumstances attending the unauthorized act." This rule is adopted and amplified in *Combs v. Scott*, 12 Allen (Mass.) 493, as follow, viz.:

"Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to act, there can be no negligence in an omission to perform it. . . . We do not mean to say that a person may be wilfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered, but our opinion is that ratification of an antecedent act of an agent which was unauthorized, cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly

omitted to make inquiry of other persons concerning them and his ignorance might have been enlightened by the use of diligence on his part to ascertain the facts."

What are material facts and circumstances?

They are such as are "of legal significance in the cause, having such a relation to the question in controversy that they may or ought to have some influence on the determination of the cause."

There are several such facts in connection with the contract of October 29, 1906, all of which are clear, plain, and easily understood, except the provisions regarding the pressure, concerning which there was some discussion as to whether it was to be on the basis of a pressure certain and determined, or on line pressure, which was more or less indefinite and subject to variation. The contract provides that the gas shall be "taken from said wells at the line pressure of said second party" (the plaintiff). There is no evidence that any stockholder or director of the defendant company had any knowledge or information regarding the importance of that matter; on the other hand it is apparent and clearly established that the defendant company "sought to be charged has misapprehended or mistaken the facts" in that regard. At the hearing in this case the plaintiff objected to enlightening the defendant company and the court on the comparative flow of gas under the proposed pressures (see cross-examination of plaintiff's secretary and treasurer, page 26 of notes filed).

Such misapprehension regarding such a material circumstance would, we think warrant such action as was taken by the defendant company, provided it act promptly upon being advised of the true facts which we think it did.

If the defendant company had received and accepted pay for the gas used in the month of November, 1906, such we think would have been such ratification of the contract of October 29, 1906, as would have stopped it from questioning such contract in the future until the expiration of the term, even though it might be used to the serious injury and disadvantage of the defendant company. For instance, suppose the line pressure in the plaintiff's mains should be

increased until it would be as great or greater than the pressure in the lines leading from the defendant company's wells to the said mains, the likely and probable result would be that very little if any gas, would pass through the meter and into the plaintiff's mains, and as a consequence the defendant company not withstanding it might have good producing wells, would get little or nothing for its product from the plaintiff, and its hands would be bound, so that it could not dispose of its gas otherwise. This of course is an extreme condition put not an impossible one.

A decree may be drawn in accord with the aforesaid conclusions.

For plaintiff, *Robinson, McKean & Martin*.

For defendant, *Cooper & VanSwearingen, Gans & Jones*.

In the case of *In re Hunter*, 18 Am. B. R. 477, it has been held that where a bankrupt's lease has expired, his trustee, who, after notice to quit, refuses to surrender possession of the premises to the landlord, is a trespasser and personally liable for the landlord's loss of three months' rent.

It has been held, in *Skewis v. Barthell*, 18 Am. B. R. 429, that, under section 70e of the Bankruptcy act, as amended, which provides that for the purpose of a recovery of property fraudulently transferred by the bankrupt, "any court of bankruptcy . . . and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction," a suit by a trustee, to set aside a transfer of real estate made by the bankrupt anterior to the four months period, is not within the jurisdiction of the bankruptcy court except by defendant's consent.

Where a servant knows and appreciates the danger of the act which he undertakes he is held, in *Chicago G. W. R. Co. v. Crotty* (C. C. A. 8th C.) 4 L.R.A. (N.S.) 832, to assume the risks of injury, or to become chargeable with contributory negligence, as the case may be, although he undertakes it under the direction of his superior.

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No. 19.

PITTSBURGH, PA., NOVEMBER 20, 1907.

## Court of Quarter Sessions, ALLEGHENY COUNTY.

### IN RE APPEAL OF THE ALLEGHENY COAL COMPANY FROM DECISION OF INSPECTOR OF MINES.

*Coal mines—Use of open lights and electricity—  
Act of 1893—Appointment of commission—  
Report of—Review of report.*

The report of a commission appointed by the court under the act of May 15, 1893, to determine the question of whether the owners of a coal mine should be permitted to use open lights and electric power for haulage in the operation of the mine can be questioned, though the exceptions refer only to the correctness of the conclusions and the judgment of the commission. A fair interpretation of the act does not mean that exceptions must be confined to the practical experience, reputation, competency or disinterestedness or to the honesty or integrity of the commission or any of its members.

In this case the court heard testimony upon the exceptions to the report of the commission and reversed their decision.

No. 73 June Sessions, 1906.

Opinion by Young, J. Filed April 18, 1907.

This case comes to us on the appeal of the Allegheny Coal Company, a corporation of Pennsylvania, operating a bituminous coal mine at Harwick in the township of Springdale in this county, from the decision of the mine inspector of the seventh bituminous district of the state, refusing the request of the Allegheny Coal Company to permit the use of open lights and electric power for haulage and machines in the Harwick mine. After the appeal had been presented and ordered filed in the Court of Quarter Sessions, that court appointed S. A. Taylor, W. J. Coulson and F. Z. Schellenberg as a commission to examine the Harwick mine and report the facts as they existed, touch-

ing the matters mentioned in the appeal, and that commission upon October 8, 1906, filed its report to the court, and upon October 16, 1906, C. B. Ross, inspector of the second district; T. K. Adams, of the third; Elias Phillips, of the fourth; John D. Pratt, of the seventh; J. Knapper, of the eighth, and Rodger Hampson, of the twelfth district, by leave of court, filed what is designated as a supplemental report, but which was in fact a number of exceptions to the report of the commission. The cause was then set down for argument in the Court of Quarter Sessions, and on November 30, 1906, the court proceeded to hear evidence upon the report of the commissioners and the exceptions filed by the mine inspectors, and the cause was so proceeded in that finally all the evidence having been taken and counsel of the respective sides having been heard, both in oral argument and by written brief, the cause now comes to us for decision.

It has been insisted upon by counsel for the appellant that inasmuch as the commission was duly appointed by the court under the act of May 15, 1893, upon appeal from a decision within the discretion of the mine inspectors, and as the persons appointed were "practical, reputable, competent and disinterested persons," whose duty it was to examine the mine and the cause of complaint and report the facts as they existed, with their opinions, and as they did so report, and as none of the exceptions filed, it is claimed, go to either the practical experience, reputation, competency or disinterestedness of the commission or to the honesty or integrity of their conclusions as reported, the court must dismiss the exceptions, they being based upon mere matters of difference in judgment as between the inspectors of mines and the commission appointed by the court to determine the matter. And in support of this contention counsel for plaintiff cite the case of the *Appeal of the Ellsworth Coal Company*, 36 P. L. J. 219, where the learned judge says:

"As we have already said in this opinion the qualifications of the persons appointed by the court are set out here, and their examination of the mines in question, together with their conclusion that they are safe to

be worked with electricity referred to, as showing a compliance with the act in the requirements of those to be appointed, and that none of the exceptions filed go to either their practical experience, reputation, competency or disinterestedness or to the honesty or integrity of their conclusions as reported, without which the court must dismiss exceptions based on mere matters of a difference in judgment as between the inspector of mines and this board provided for by law to determine such matters."

We can not agree with the statement of the law that if the experts appointed by the court are fit and competent, and their report has been honest, no matter what the facts may show, no matter how many fit and competent experts may have testified to a different conclusion, the report must be sustained unless it can be shown that those appointed by the court lack practical experience, reputation, competency or disinterestedness, or their report is lacking in honesty or integrity. The learned judge has given to the report of the commission the finality given to an award under the act of 1836, rather than the power given to masters in equity and commissioners of all kinds generally under the statutes and decisions. The act of 1893 simply provides "that the persons appointed shall be practical, reputable, competent and disinterested, whose duty it shall be under instructions of said court to forthwith examine such mine or other cause of complaint, and report under oath the facts as they exist or may have been, together with their opinions thereon." We find nothing in the act of 1893 indicating that their opinions shall be final as in the act of 1836, nor anything indicating that their competency and honesty alone are in question. We cannot transfer our duty to the shoulders of the commission and place on them the responsibility of the decision. In this very case the law provides that, if gas is being generated in such quantities as can be detected, "all entries, tunnels, airways, travelling-ways and other working places of a mine where explosive gas is being generated in such quantities as can be detected by the ordinary safety lamp," etc., "shall be worked exclusively with locked safety lamps," yet, if the mine inspectors,

knowing that gas can be detected by the ordinary safety lamp day after day refuse to violate this provision of the law, then the operator may apply to the court to appoint three men and their report shall be final unless it is shown they were not fit or their report not honest, this not determined by the facts as they exist or have been or by the wrong conclusion of the commission of the commission, but by positive affirmative evidence as to their unfitness and incompetency, or that they dishonestly made report, the burden put on the inspector not being to establish the condition of the mine, but to establish a different set of facts, namely, the dishonesty of the commission and of the report. We can not escape the responsibility of the inquiry into the facts of the case, if the report is attacked for any reason. The whole matter is then for the court. Being of this opinion when the case first came up upon the report and the exceptions, we believed it to be our duty to inquire into the facts as they existed, in order to determine whether the inspector had exercised a sound discretion in refusing the application of the appellant to use open lights in the mine and electric power for haulage and for mining machines, and we came more readily to the conclusion that this was our duty in view of the last paragraph of the report of the commission, which is as follows:

"We, therefore, in the light of our examination and from the evidence we find in the reports, etc., believe the mine can be worked with open lights and the use of electricity therein be with safety, calling special attention, however, to Rule 57 of the bituminous mining laws, and having assurances that this with the provisions of Article 5 of the mining laws be made the subject of special attention of the owners of said Harwick mine, and that the periods of time between the sprinkling of said mine be diminished if found to be necessary to keep down the dust from floating in the air, and also in the matter of oil and material for blasting to be used in the mine be subject to the same care and supervision, and as long as these conditions are maintained we believe that the mine will be safe and therefore state as our opinion that the prayer of the petitioners should be granted."

We do not regard this as an unequivocal report that the mine can be safely operated with open lights and with electricity as the power for haulage and the machines, but rather as the opinion of the commissioners that if Mining Law No. 57, to-wit, "No safety lamps shall be entrusted to any person for use in mines until he has given satisfactory evidence to the mine foreman that he understands the proper use thereof and danger of tampering with the same," be observed; and section 5 of article 5 of the same law, which requires that all entries and working places where gas can be detected by the ordinary safety lamp, and all pillar and other workings where a sudden inflow of explosive gas is likely to be encountered, shall be worked exclusively with locked safety lamps, be observed, and that if open lights are prohibited in all working places where fire-damp might be carried in the air currents in dangerous quantities, then, if the other conditions named in their report, namely, that the time between sprinkling be reduced so as to keep down the dust from floating in the air and care be taken in the matter of oil and blasting material, be observed, the request of the company to use open lights in the mine and electric power for haulage and for mining machines should be allowed. If we were to follow the report and make an order that open lights and electricity could be used in this mine subject to the provisions of article 5, section 5, which the commission makes a condition, it would simply leave the matter where it is now, that is, in the discretion of the mine inspector. We must therefore determine by the evidence whether the mine inspector was right in prohibiting the use of open lights in the entries and other working places of this mine. To this end we have taken the evidence as to the condition of the Harwick mine generally, as well as in those places where the report filed by the mine inspectors shows explosive gas was found in the mine, and also as to the production of dust and the probability of pockets of gas being struck in mining.

Article 5, section 5 of the act of 1893 provides that the use of open lamps is prohibited (1) in all entries and other working places of a mine where explosive gas is being gen-

erated in such quantities as can be detected by the ordinary safety lamp, (2) in all pillar workings and other working places where a sudden inflow of explosive gas is likely to be encountered, and (3) in all working places through which fire-damp might be carried in the air current. Let us then inquire, first, is gas being generated in such quantities as can be detected by the ordinary safety lamps in the entries, tunnels, air-ways, travelling ways and other working places of the mine? Many witnesses have been examined as to the finding of explosive gas in these places, but their evidence only covers, when carefully examined, a few days on or about the time of the visit of the commission and since that time. The three commissioners, Messrs. Taylor, Coulson and Schellenberg, visited the mine September 28, 1906, and testified as to an examination at that time. The mine inspectors, Messrs. Ross, Adams, Phillips, Pratt, Knapper and Hampson, examined the mine on October 12, 1906, Mine Inspector John F. Bell, on November 23, 1906, Mine Foreman Samuel Peck, September 28, 1906, Mine Foreman H. E. Sweet, December 26, 1906, Mr. D. D. Blackburn, November 22, 1906, Benjamin Fereday, December 28, 1906, Peter Y. Cox, mine inspector for the Pittsburgh Coal Company, September 4, 1906, John M. Rayburn, November 27, 1906, and Alexander McCanch, September 12 and 13, 1906, and they have all testified and their testimony will be referred to hereafter. We fortunately, however, have in evidence in this case the fire-bosses' daily report of this mine beginning on the 8th day of February, 1904, continuing down to about the time of the closing of the testimony, January 24, 1907. This book is kept in accordance with article 5, section 2 of the act of 1893, wherein it is provided that every working place without exception and all roadways shall be carefully examined immediately before each shift by a competent person or persons appointed by the superintendent and mine foreman for that purpose, such person to have a fire-boss' certificate of competency. The fire-bosses' daily report apparently covers every day during which the mine was in operation. An examination of this book shows that, beginning with July 1905,

explosive gas was found in some part of the working places or entries of the Harwick mine almost every day. In January, 1907, gas was found in four different entries ten times and twice in rooms; in December, 1906, gas was found in six different entries nine times and in two rooms; in November, 1906, gas was found twenty-seven times in five different entries; in October, 1906, gas was found in nine different entries thirty-three times and in three rooms eleven times; in September, 1906, gas was found in fifteen different entries fifty-one times and in five different rooms eighteen times; in August, 1906, gas was found in six different entries thirty-seven times and in seven different rooms thirty-nine times; in July, 1906, gas was found in four different entries twenty times and in eight different rooms thirty-seven times. For the six months preceding July, 1906, we have showings of gas in the different workings of this mine, in January, 50 times; February, 37 times; March, 97 times; April, 9 times (the mine being in operation only three days), May, 20 times, and June 92 times. For the six months preceding January, 1906, we have recorded showings of gas for the month of December, 1905, in the entries and working places, 80 times; in November, 1905, 89 times; in October, 115 times; in September, 108 times; in August, 214 times; July, 214 times. During those 18 months we have gas found in No. 1 main entry south, 10 times; in No. 3 main entry south, 62 times; in No. 2 main entry north, 35 times; in No. 2 old main north, 47 times; in No. 1 right north butt, once; in No. 2 right north butt, once; No. 3 right north butt, 22 times; No. 4 right north butt, once; No. 5 right north butt, twice; No. 1 left butt south, 29 times; No. 2 left butt south, 35 times; No. 3 left butt south, 12 times; No. 5 left butt south, 10 times; No. 6 left butt south, 26 times; No. 8 left butt south, 21 times; No. 9 left butt south, 37 times; No. 10 left butt south, 46 times; No. 1 right butt south, 97 times; No. 2 right butt south, 51 times; No. 3 right butt south, 116 times; No. 4 right butt south, 27 times; No. 6 right butt south, 34 times. We have, then, the fire-bosse's report showing the finding of gas in all the entries of this mine during the past eighteen

months, except in No. 2 main entry south, No. 1 old main north, No. 2 left butt north, No. 2 right north butt, No. 4 left south butt, No. 7 left south butt, at the times above indicated. We have also the testimony of the different witnesses showing the finding of gas by them on the different occasions and the quantity. The commissions, Taylor, Coulson and Schellenberg, found only a slight trace of gas in one place, No. 1 south right butt entry, though they testify to having examined the mine carefully. That same day Samuel Peck, mine foreman of this mine, discovered gas in No. 4 room, old main north entry, fifteen to eighteen feet back from the face, four to six inches from roof and twelve inches from the face. This is reported in fire-bosse's report book as a slight showing of gas. The mine inspectors, Ross, Adams, Phillips, Pratt, Knapper and Hampson, visited the mine October 12, 1906, and their report shows that they found gas in room 4, old main north entry, and Nos. 1, 2, 3, 4, 5, 6 and 8 entries, south side of mine. And in No. 8 entry south the gas was six feet back from face of the entry and nine inches in depth. Mr. Gatehouse, superintendent of the Harwick mine, attended on that day with the inspectors and accounts for the showing in No. 8 left south entry by the fact that they were at that time going through a clay vein. The fire-bosses' report for that day shows gas in room 4, old main north, and in entries 8 butt left south and 2 right butt south, but not in entries 1, 3, 4, 5 and 6. Mine inspector John A. Bell visited the mine on November 23, 1906, and found gas in No. 3 left south butt. Mine Foreman H. E. Sweet testified to December 26, 1906, and found gas in No. 2 right south butt thirty feet long by four inches thick by eight feet wide, a 3 per cent mixture or 2.4 cubic feet of gas to 80 cubic feet of mixture; in 3 right south, fifteen feet in length by eight feet in width by four inches deep, a 3 per cent mixture or 1.2 cubic feet of gas to 40 cubic feet of mixture, and in room 47, No. 5 left, a slight showing. These finds by Sweet were at the workings at extreme end of entry and after the fan had been stopped for 86 hours. Mr. Blackburn examined the mine on November 22, 1906, and found

very little gas. Benjamin Fereday visited the mine on November 28th and made a thorough examination, and found gas in No. 3 butt right north. Peter Y. Cox, a mine inspector for the Pittsburgh Coal Company, visited the mine on September 4, 1906, and found a small trace of gas in room 19, 1 right south butt, and in B face, 1 left butt south. We have then the evidence of the fire-boss report book showing findings of gas in many parts of this mine many times, and the evidence of the mine inspectors and Mr. Peck, and against it the evidence of the commissioners, Superintendent Bell, Messrs. Blackburn, Fereday and Cox as to an examination by them respectively on one occasion each, on September 28th, November 23rd, November 22nd, November 28th and September 4th.

We are not satisfied that the fire-boss report book by any means shows all the findings of gas since August, 1906, and especially since October 12, 1906, there being in January thirty shifts showing no gas as against eleven findings of gas from January 1 to 24, 1907, and 41 shifts showing no gas as against 12 shifts showing gas in December, 1906, and 45 shifts showing no gas as against 27 findings of gas in November, 1906, and 35 shifts showing no gas as against 49 showings of gas in October, 1906, and 29 shifts showing no gas and 34 showing findings of gas in September, 1906, and 12 shifts showing no gas and 26 shifts showing gas from August 15th to 31st, 1906, that being the time Mr. Sweet became mine foreman, as compared with the months of August, July, June, May, April, March and February preceding, the fire-boss report from August 1st to 15th, 1906, showing 9 shifts with no gas and 18 showing findings of gas, and July, 1906, 36 shifts showing no gas and 29 shifts showing findings of gas in 49 places, and June, 1906, 7 shifts showing no gas and 49 shifts showing gas found in entries fifty-eight times and in rooms twenty-four times, and in May, 1906, 19 shifts showing no gas and 16 shifts showing gas in fourteen entries and six rooms, and the three days of April, the 2nd, 7th and 16th, being the only days the mine was in operation, showing 4 shifts and finding of gas on every shift in entries five times and

in rooms four times, and in March, 1906, 40 shifts showing no gas as against 43 shifts showing gas found in entries fifty-five times and in rooms forty-nine times. While, therefore, we are not satisfied that the fire-boss report book is correct as shown by a comparison for the six months preceding and following the coming of Mr. Sweet as mine foreman and the explanation of Mr. Foster that the slightest showing of gas was recorded, the book is certainly evidence for the times and for the findings of gas which it reports. The evidence, therefore, clearly proves that gas is almost daily exuding from the workings of this mine and being generated in the entries and rooms of the mine.

It is argued by counsel for the appellants that the gas generated comes only from the face workings. This may be true so far as the evidence of Messrs. Peck, Bell, Blackburn, Fereday, Cox, Foster and the mine inspectors respectively go as to showing of gas on September 4th, September 28th, October 12th, November 22nd, 23rd and 28th, but the fire-boss report book shows that it is found in the entries much more frequently than in the rooms, and these findings of gas are not certainly all at the face of the workings. Taking findings in January, 1907, from the 1st to the 24th, the gas was found 10 times in the entries and 3 times in the rooms; in December, 1906, gas was found 9 times in the entries and 3 times in the rooms; November, 1906, gas was found 26 times in entries and in no room at all; in October, 1906, gas was found 37 times in entries and 12 times in rooms; in September, 1906, gas was found in entries 51 times and in rooms 11 times; in August, 1906, in entries 40 times and in rooms 45 times. Each of these was a separate finding of gas, because Foster testifies that after the coming of Sweet as mine foreman, August 15th, whenever gas found it was removed. But it is claimed that these findings of gas are not dangerous, that they were small in quantity and easily removed. In our opinion this is not the question as to entries, etc. The law provides "all entries, etc., where explosive gas is being generated in such quantities as can be detected by the ordinary safety lamp, shall be worked exclusively with locked safety lamps." The law fixes



the requirement of working with locked safety lamps, not by danger nor by any quantity except a quantity sufficient to be detected by the ordinary safety lamp, and by the fact that the gas is explosive. As to this the mine inspector has no discretion, whatever may be said of his discretion in pillar workings as to the likelihood of a sudden inflow from the pillar and other workings by reason of the subsidence of overlying strata, or where fire-damp might be carried in the air current in dangerous quantities.

This case has been tried largely upon the theory as to whether it is safe or not to use an open light. This, it is probable, is the question as to sudden inflows and as to fire-damp in the air current, but it is not the question as to gas in entries and other workings mentioned in the first clause of section 5, article 5 of the act of 1893. The question there is, is explosive gas being generated so as to be detected by the ordinary safety lamp? If it is, then the place where found must be worked with the safety lamp. It is not a question of the discretion of the inspector. The law does not leave that to his discretion. It is positive, without exception. This being an appeal from his discretion that open lights could not be permitted in this mine, we must say that as to the entries and other working places, the only question that was open was in what parts of the mine was gas found and was the gas explosive? The witnesses say that the gas was explosive and the evidence shows that it was found many times in entries No. 2 main north, No. 2 old main north, Nos. 1 and 3 main south, Nos. 1, 2, 3, 4 and 6 right south, Nos. 1, 2, 3, 5, 6, 8, 9 and 10 left south, Nos. 1 and 3 left north, and Nos. 1, 2, 3, 4 and 5 right north, 24 out of 32 entries, and in many rooms in No. 1 and 3 right south, Nos. 1, 3, 5 and 8 left south, and in Nos. 1 and 3 left north, and Nos. 3 and 5 right north, and in old main north; and under the law as it is written the mine inspector was required to prohibit these entries and rooms to be worked except with locked safety lamps. The mine inspectors, Messrs. Pratt, Roby and Adams, properly, therefore, refused to allow open lights in the entries and rooms of this mine.

But before finally disposing of this case,

let us consider the danger of a sudden inflow of gas and the probability of fire-damp being carried into the air current, and generally, the danger of open lights and unprotected electric apparatus in the Harwick mine. The evidence "that a sudden inflow of explosive gas is likely to be encountered in pillar workings and other working places by reason of the subsidence of the overlying strata or from any other cause" is very slight. The fire-boss report book shows that there were fifty falls of slate from January, 1906, to January 24, 1907, and in not one of these cases was any gas recorded as occurring at the place where the slate fell, and that there were about sixty other cases of bad roof in the same time and no sudden inflow therefrom. And the only evidence of a sudden inflow of gas at the workings was on the occasion mentioned by Mr. Gatehouse, October 12, 1906, during the visit of the inspectors. So that there is no evidence in this case of there having been a sudden inflow of gas in pillar or other workings caused by the subsidence of the strata or for other causes.

Much evidence was submitted as to whether fire-damp or explosive gas might be carried in dangerous quantities into the working places and roadways in the air current. This involves the consideration not only of the gas generated but also as to its probability of being carried mixed with dust into the air current. The fine dust itself, of course, is inflammable. The danger to be apprehended is not so much the carrying of small quantities of gas into the air current or of small quantities of dust, but rather the presence of dust at the workings, the generation of gas there, the ignition of the gas, its explosive quality increased by the dust, and the dust becoming a vehicle for carrying the fire still further, which extends to all parts of the mine if dry, because the explosion and the current created by that and the burning gas and dust, stir up the dust before it. We have then the gas, the dust at the working places, and the dust on the top, bottom and sides of the entries and roadways. Having these conditions no one can tell the extent of the effect. Therefore, evidence has been submitted as to the ventilating system to keep the gas cleared out, and

the sprinkling system to lay the dust. In this mine the ventilating system and sprinkling system have been testified to by many witnesses as very good. There seems to be no doubt under the evidence that the systems are good, but the question is as to their effectiveness as applied for the purposes for which they were installed. It is claimed that the air can not be and is not carried close to the workings where gas is being generated, and that the sprinkling as applied is insufficient to lay the dust properly. We are impressed with the belief that the systems as applied are not as effective as they might be, and that they do not answer the proposition that the flames would be carried through the mine were the gas and dust to be ignited at the face of the workings. They are certainly wise precautions, and the operators of this mine would be negligent were they not to continue them and make them as efficient as possible; but that does not answer the position of the inspectors, and as sustained by the evidence, that gas is being generated in all parts of this mine, has been daily generated in some part, either rooms or entries, more frequently in entries than in rooms, and that the presence of an open light will ignite this gas and a greater or less explosion occur, carried to a greater or less distance in different parts of the mine. Were we not of the opinion already stated that the mine inspectors properly refused to allow open lights in the entries, roadways and working places of this mine, for the reasons stated, we would sustain them in their decision refusing to allow open lights in this mine, for the reason that the evidence satisfies us that this mine is so constantly generating gas that the dust produced at the working places is in sufficient quantities and is so suspended there in the air that the ignition of the gas by an open light might carry the flame to different parts of the mine. Generally on the question of the danger of introducing open lights and electric machinery into this mine, while the appellants have produced many expert witnesses to testify that it would be safe, we regard the evidence of the mine inspectors on the part of the exceptants as entitled to greater weight. The evidence of the mine inspectors is of great weight because of their long and practical experience

obtained in the performance of their duty as mine inspectors. The evidence of Cox, Fereday, McCanch, Blackburn and Rayburn, and others, who visited the mine as experts, is also entitled to great weight because of their practical experience. But the evidence of the mine inspectors, in our opinion, outweighs the evidence of the witnesses for appellant, and were we to determine this case on the question of the evidence of the experts called as to the danger of introducing open lights and electricity we should unhesitatingly say, that the evidence shows that it would be unsafe.

Having decided that open lights can not be used in this mine, it necessarily follows that the use of electric wires and electric currents is positively prohibited, unless said wires and machinery and all other mechanical devices attached thereto are constructed and protected in such manner as to secure freedom from the emission of sparks or flame therefrom into the atmosphere of the mine.

We are therefore of the opinion that the decision of the mine inspectors in refusing to approve the request of appellants to be permitted to use open lights in the Harwick mine and electric power for haulage and mining machines in said mine should be sustained.

And now, April 18, 1907, after hearing and due consideration, the exceptions filed to the report of the commissioners in this case on October 8, 1906, are sustained and the report of said commission is set aside, and the decision of the mine inspectors refusing to permit the use of open lights and electric power for haulage and machines in the Harwick mine, is sustained and the appeal of Allegheny Coal Company dismissed at the cost of the appellant.

November 12, 1907,

This case comes before us now upon a motion by appellant to reconsider our former opinion and to modify the order dismissing the appeal so as to allow open lights and electric haulage in certain parts of the Harwick mine.

Upon this motion the court in banc has taken additional testimony and heard the whole case re-argued by the respective counsel, both in oral argument and written brief. After a careful consideration of the case the court is of the opinion that the original should stand.

The motion to modify the original order

is therefore refused and the order dismissing the appeal is affirmed.

For appellant, *George E. Alter.*

For mine inspectors, *W. H. Piatt.*

Forexceptants, *Patterson, Sterrett & Acheson.*

## Executive Department,

HARRISBURG.

### BANK REPORTS.

*Banks and banking—How to conduct the business—Accounting for liabilities—Report to banking department—Act of 1907.*

If a depositor neglects to bring his pass book with him at the time of making a deposit, a loose receipt or a receipt on a duplicate deposit slip can be furnished to the depositor, and the amount of the deposit subsequently entered in his pass book. It is the plain intent of the act of 1907 that a receipt of some kind, "by pass book or otherwise," be given at the time the deposit or investment is made.

The primary purpose of the act of 1907, P. L. 525, is to require banking institutions to make reports which clearly and accurately show their exact financial condition, and for that reason the aggregate of such liabilities as moneys received as deposits, dues, or on account of instalments for any trust or investment whatever shall be set out in full.

Request of Commissioner of Banking Berkeley for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed August 23, 1907.

I am in receipt of your letter of August 21, 1907, inquiring when receipts must be furnished depositors and investors under the provisions of the act of June 12, 1907, P. L. 525, entitled "An act requiring banks, trust companies, savings fund societies, building and loan associations, bond and investment companies, provident associations, and all other corporations under supervision of the commissioner of banking, to furnish receipt in full to each depositor or investor for moneys received, which shall also be entered in full on books of the company; statement of liabilities to be set out in full in all reports to commissioner of banking or other supervisory authorities; statement of all moneys borrowed to be placed in full as liabilities on books of the company; violation of provisions of this act a misdemeanor, and penalty therefor."

In your communication you state that many of the depositors in banks and trust companies neglect to bring their pass books with them at the time of making deposits, and you ask to be advised whether the act

will be complied with if such deposits are entered in the pass books when they are subsequently presented for settlement, or whether a receipt must be given at the time the deposit is received.

The primary purpose of the act in question is to compel the officers and employees of every bank, trust company, saving fund society, building and loan association, bond and investment company, provident association or company, or any other corporation, now or which may hereafter be placed by law under the supervision of the commissioner of banking, or which may hereafter be incorporated, whether domestic or foreign, to keep the books of such institutions and make the reports required by law, in such manner as to clearly, truthfully, and accurately show their exact financial condition. To this end it is provided that all moneys received by such institutions, whether as deposits, dues, or on account of instalments, for any trust or investment whatever, shall until refunded constitute a liability upon the part of the corporation, and that in all reports furnished to the commissioner of banking, the courts of law or other supervisory authorities, the aggregate of such liabilities shall be set out in full.

Other provisions not directly connected with the matter now under discussion, but directed toward the accomplishment of the main purpose of the act are also contained therein.

It is expressly provided in Sec. 1 of the act that every institution affected thereby "shall furnish each depositor or investor with a receipt in full, by pass book or otherwise for all moneys received, etc." One of the purposes of these receipts is, of course, to furnish evidence of the existence of the liabilities referred to in the act, and it seems to be the plain intent of the act that the receipts in question are to be furnished at the time the deposits or investments are made. The receipts, however, may be furnished "by pass book or otherwise."

If a depositor neglects to bring his pass book with him at the time of making a deposit, a loose receipt or a receipt on a duplicate deposit slip can be furnished to the depositor, and the amount of the deposit subsequently entered in his pass book. It is essential, however, in my opinion, that a receipt of some kind "by pass book or otherwise" be given at the time the deposit is received.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

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PITTSBURGH, PA., NOVEMBER 27, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

COMMONWEALTH ex rel. v.  
RHOADS.

*Boroughs—Councilmen—Interest in contracts—  
Ouster from office—Act of March 31, 1860,  
section 66.*

Where a borough councilman is a stockholder in a corporation which has contracts with the borough the act of March 31, 1860, section 66, applies, and on quo warranto he will be ousted from office, although he did not vote on the corporation's contracts and no fraud is alleged.

No. 458 July Term, 1907. Sur demurrer to respondent's answer.

Opinion by FRAZER, P. J. Filed October 24, 1907.

The writ of quo warranto was issued in this case at the instance of the district attorney, requiring respondent to show cause why he should not be removed from his office as councilman in and for the borough of Versailles. To the petition an answer was filed by respondent, to which petitioner demurred. The facts are as follows: Respondent, who is a resident and qualified elector of the borough of Versailles, was on the third Tuesday of February, 1906, elected a member of the council of the borough, and as such qualified on the first Monday of March, 1906, and has since been acting in that capacity. He was at the time of his election to council, and is still, one of the largest stockholders in the D. V. Ault Company, a corporation, and is also its president. During the year 1906 the D. V. Ault Company sold and furnished large quantities of sewer pipe to the borough of Versailles, for which warrants were issued to the company upon approval of bills therefor by council, which warrants were duly paid by the pro-

per borough authorities. The prices charged were the usual and ordinary prices charged others for such material. When bills for the materials were presented to council, respondent, though present in the council chamber, declined to vote either for or against their approval. It also appears that in February, 1907, the street committee of council received bids for the construction of a sewer within the borough, the D. V. Ault Company being one of the bidders, its bid of \$7,757.40 being \$2,270.40 higher than the lowest bid. On Monday, March 4, 1907, the bond of the D. V. Ault Company was approved and the contract awarded to it. No further action, however, was taken in the matter as the health authorities of the state refused to approve the plans of the borough for its sewage system.

The 66th section of the act of assembly, approved March 31, 1860, is relied upon to support this writ, and provides as follows:

"It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution to be in any wise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution, of which he shall be a member or officer or for which he shall be an agent nor directly nor indirectly interested therein . . . and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office and appointment thereunder."

The courts have uniformly held that it is a violation of the provisions of the act above quoted for a member of council to be interested either directly or indirectly in any supplies furnished to the municipality of which he is an officer. The respondent's contention that the act does not apply to a stockholder of a corporation that furnishes supplies to a municipality, is not sound. If it was, the act could very easily be rendered a dead letter. In *Commonwealth v. De Camp*, 177 Pa. 112, it appeared that De Camp, the respondent, was interested as an officer and stockholder in an electric light company which had a contract with the city of Philadelphia to supply electric light to the

municipality. The contract in that case was entered into previous to De Camp's election to council. The Supreme Court, notwithstanding that fact, held that he was interested in the contract and ousted him from his office as councilman. That case, it seems to us, directly rules the case now before us. To the same effect, substantially, are *Commonwealth v. Whitman*, 217 Pa. 414, and *Commonwealth v. Miller*, 31 Pa. 309. We have no doubt whatever that the prohibition of section 66 of the act of March 31, 1860, above quoted, applies to a councilman who is a stockholder and officer in a corporation that furnishes supplies to the municipality of which he is an officer, and the fact that the officer takes no part in the proceedings authorizing the purchase of the supplies or for their payment, is immaterial. As we understand the law above quoted, no one can be a member of the council of a municipality and at the same time furnish the corporation with supplies, without violating the law. It is conceded that respondent was a stockholder and officer of the corporation which furnished the borough of Versailles with sewer pipe. His company, therefore, had no right to furnish the materials and by permitting it to do so the law was violated, and the respondent became liable to the penalty provided, which is that he forfeit his office. While no corruption or extortionate charges were alleged against either the respondent or the corporation of which he was an officer, the fact that he was interested in the profits derived from the sale of the sewer pipe to the borough makes the act of assembly applicable to his case and imposes upon us the duty of enforcing the penalty provided therein.

And now, October 24, 1907, demurrer sustained and it is ordered, adjudged and decreed that P. F. Rhoads has forfeited his office of councilman in the borough of Versailles and that he be ousted therefrom, and it is further ordered that he pay the cost of this proceeding.

For plaintiff, *Robert F. Graham*.

For defendant, *Wishart & Dickie*.

In the case of *Parker v. Black*, 18 Am. B. R. 15, the Circuit Court of Appeals, Second Circuit, has held that a trustee in bankruptcy may maintain a suit in equity to recover a voidable preference.

(Common Pleas No. 2, Allegheny Co.)

## ASHWORTH v. PITTSBURGH RAILWAYS COMPANY.

*Streetcar fares—Municipal regulations—Act of June 7, 1907.*

The act of June 7, 1907, regulating streetcar fares in cities of the second class is not local or special legislation within the prohibition of the Constitution.

The regulation of fares on a streetcar is a municipal affair.

No. 138 October Term, 1907.

Opinion by SHAFER, J. Filed September 20, 1907.

The action is in trespass by a passenger for damages for being expelled from one of defendant's street cars in the city of Pittsburgh. The declaration alleges that before June 7, 1907, by a lawful and reasonable rule and regulation of the defendant company the fare on defendant's line between twelve o'clock midnight and five o'clock in the morning had always been ten cents; that on June 7, 1907, an act was approved by the governor which forbade any street railway company to charge more than five cents for each trip "within the corporate limits of any city of the second class;" that on July 16, 1907, between midnight and five o'clock, the plaintiff became a passenger on defendant's car for the purpose of riding exclusively within the limits of the city of Pittsburgh; that he tendered the conductor five cents as his fare; that the conductor refused to accept the same and demanded ten cents, and compelled him to leave the car by reason of his refusal to pay ten cents. To this declaration the defendant has demurred, the sole question for demurrer being the claim that the act in question is unconstitutional.

Upon the argument and in the briefs furnished by counsel no claim is made that the act is unconstitutional by reason of any attempted interference with the defendant's chartered rights, or that the fare of five cents fixed by the act is unreasonable. The sole claim of the defendant is that the act is void as being special and local legislation prohibited by the Constitution.

The plaintiff argues that the act is general because the prohibition is directed to every

company operating a street railway in the commonwealth. It is, however, not the form but the substance and effect of the act which must be considered, and if the effect is local or special, the generality of form will make no difference. The effect of the act is to regulate street railway fares in cities of the second class. If this is included among the subjects or purposes for which classification of cities is allowed, the act is not special, and otherwise, it must be held to be special and therefore void. By the act of June 25, 1895, P. L. 275, the cities of the commonwealth are divided into three classes "for the purpose of legislation regulating their municipal affairs, the exercise of certain corporate powers, and having respect to the number, powers and duties of certain officers thereof." The classification attempted by this act and the purpose for which it is made, are in accordance with the decisions of the Supreme Court as to the permissible classification of cities. The question in this case, therefore, is whether or not the act in question can properly be said to be a regulation of the municipal affairs of cities of the second class. As was said in the case of *Reeves v. Philadelphia Traction Company*, 152 Pa. 162, "the control of the vehicles that shall be used on the public streets for the general conveyance of passengers, the rate of speed and the motive power by which they shall be propelled, is . . . the subject of municipal duty. In fact, public conveyances, whether ferryboats, barges, hackney coaches or omnibuses, have been subjects of police regulation and license as long as they have been known or used in Pennsylvania." As to such public conveyances one of the most frequent subjects of municipal regulation has always been the rates of fare to be charged. We are therefore of opinion that the regulation of the fares to be charged for riding on a streetcar in a city is a municipal regulation, and that the subject of such rates is a municipal affair; whether the regulation is effected by a grant of power by the legislature to the city to make it, or is made by the legislature itself, seems to us to make no difference. We are of opinion that the case is substantially ruled by that of *Reeves v. Traction Company*, above mentioned.

The case of *Weinman v. Pass. Ry. Co.*, 118 Pa. 192, on which the plaintiff relies, is fully distinguished from the case of *Reeves v. Traction Company* in the opinion of Mr. Justice Mitchell in that case. The act in question contains a section which makes it a misdemeanor in any officer or employee of a street railway company to demand or receive more than five cents fare. The validity of this section is not in question in the present case. Whether it is valid or not, does not affect the regulation contained in the first section or its effect upon the rights of the plaintiff.

Being of opinion, therefore, that the act in question is not local or special legislation, and therefore not unconstitutional for that reason, that being the only reason alleged or argued by the defendant, the demurrer is overruled and it is ordered that the defendant answer over.

For plaintiff, *Hall & Metcalf*.

For defendant, *Burleigh, Gray & Challenger*.

(Common Pleas No. 2, Allegheny Co.)

### COMMONWEALTH ex rel. v. BRISBIN.

*Quo warranto—Service—Return day—Act of June 14, 1836.*

A writ of quo warranto against a street commissioner of a city was issued April 27th, returnable May 4th. Held, it was contrary to the act of June 14, 1836, requiring the writ to be served at least ten days before return day that a general appearance would not cure the defect and the writ should be quashed.

No. 360 July Term, 1907. Sur motion to quash writ of quo warranto.

Opinion by SHAFER, J. Filed May 29, 1907.

In this case a writ of quo warranto was issued at the relation of the district attorney against defendant, who was appointed street commissioner of McKeesport for a term ending the first Monday of May, 1907. The writ was issued on April 27, 1907, and was made returnable May 4, 1907.

The act of June 14, 1836, P. L. 624, provides that such a writ may be made returnable at any time within the term, but the sixth section of it provides that "the writ

aforesaid shall be served at least ten days before the return day." To this writ the defendant entered a general appearance, and the first question arising upon the motion to quash is whether or not this appearance cures the defect in the writ. We have no doubt that if the writ had been made returnable ten days or more before the return day and the sheriff had failed to serve it as directed by the act, that this would constitute a mere defective service which might be set aside if steps were taken in time, and which a general appearance would cure; but the writ in this case was one which from the moment of its issue it was impossible for the sheriff to serve as required by law. We are therefore of opinion that the writ was made returnable at a time not authorized by law, and is therefore within the ruling of the Supreme Court in the case of *Williamson v. McCormick*, 126 Pa. 374, and that the writ must be quashed for this reason.

The defendant has also assigned as a reason for quashing the writ that it appears upon the face of the pleadings that the term of office of the defendant would expire before the case could be brought to trial or hearing and before a writ could be legally served. The ordinance creating the office of street commissioner, which was made a part of the suggestion, shows that the term of an incumbent is to last for two years from the first Monday of May "and until his successor shall be duly qualified;" and it also appears from the amended suggestion that the mayor of the city of McKeesport undertook to remove the defendant and to appoint some one in his place, but that the select council, whose concurrence is necessary, refused to confirm the mayor's nominee. It may therefore well be that the term of the defendant might not expire for a long time to come. We are of opinion that this is not a good reason for quashing the writ, but for the first reason assigned above, the writ must be quashed.

For plaintiff, *Jackson & Lang*.

For defendant, *John D. Douglass*.

The assignment of the unearned part of his salary by a public officer is held, in *McGowan v. New Orleans (La.)* 8 L.R.A. (N.S.) 1120, to be against public policy, and void.

## Executive Department, HARRISBURG.

### CRANBERRY TOWNSHIP ROAD.

*Road law—Preliminary bond—Bids to construct roads—Suit to collect penalty.*

Under a considerable practice prevailing in the state highway department, F. filed a preliminary bond in the sum of \$1,000 conditioned to be void if, upon the acceptance of the bid of the obligor and the awarding of a contract to him, he should execute the contract in writing for the construction of the work and file a further bond for the faithful performance of said contract. F. executed the contract in writing and filed the bond, but the surety company on his bond as contractor subsequently withdrew, alleging false representation on the part of F., which caused delay in having the highway in question constructed. Held, that under the facts and circumstances of the case no proceedings should be instituted to collect said \$1,000.

Request of State Highway Commissioner Hunter for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed August 15, 1907.

I am in receipt of your inquiry of July 11, asking to be advised as to whether proceedings should be instituted to collect from E. Bleakley, the amount of the bond given by him October 18, 1905, in the sum of \$1,000, as surety for J. A. Fredericks. From your communication and the papers submitted herewith, I understand the facts relative to the execution and delivery of the bond in question to be as follows:

Prior to October 18, 1905, the state highway department advertised for proposals for the construction of a section of state highway in the township of Cranberry in the county of Venango, Pa., under the provisions of the act of May 1, 1905. Among the bidders for the construction of said section of state highway was the said J. A. Fredericks of Franklin, Pa., whose bid of \$43,239.37 was accepted. Filed with the bid was a bond given by the said J. A. Fredericks, with the said E. Bleakley as surety, to the commonwealth, in the sum of \$1,000, dated October 18, 1905, and conditioned as follows: "Now the condition of this obligation is such that

if the bid of the above bounden J. A. Fredericks shall be accepted by the state highway commissioner, and the contract for the said work shall be awarded to the said bounden J. A. Fredericks, then the said bounden J. A. Fredericks shall and will execute contract in writing with the said commonwealth of Pennsylvania for the construction of the said work in accordance with the plans and specifications, and shall and will file a further bond for the faithful performance of said contract as required by the said act. Then shall this obligation be void, otherwise remain in full force and virtue."

The bid of the said J. A. Fredericks having been accepted, a contract in writing was executed by him for the construction of said work in accordance with the plans and specifications, and an additional bond in a sum equal to the amount of the contract, with the Title Guaranty and Surety Company, of Scranton, Pa., as surety, was filed with the state highway department. However, before the said contract had been signed by the state highway commissioner, the said Title Guaranty and Surety Company of Scranton, surety as aforesaid, notified the highway department that it withdrew from said obligation, on the ground that its execution thereof had been secured by false representations on the part of the said J. A. Fredericks, and that it would no longer be responsible to the state as surety for the said contractor.

The said J. A. Fredericks, having been notified of the withdrawal of the said surety company as his surety, agreed to secure another surety, but failing in this, was notified by the state highway department on May 25, 1906, that by reason of his failure to furnish an acceptable bond, the contract heretofore awarded to him was annulled as of that date, and his said preliminary bond of \$1,000 forfeited. A new contract for the construction of said road was subsequently awarded on July 23, 1906, to another contractor, who is now constructing said highway.

The surety on said preliminary bond, the said E. Bleakley, having been notified of the forfeiture thereof, has failed and neglected to pay the amount of said bond.

Under these circumstances, you ask to be advised as to the propriety of instituting proceedings looking toward the collection of the amount of said preliminary bond.

There does not seem to be any provision in the act of assembly, under the terms of which said highway is being constructed for the giving of the said preliminary bond of \$1,000, the provision of said act relative to the giving of a bond by the contractor being as follows:

"Every person, firm, or corporation, on being awarded any contract, for the construction or improvement of any highway, under the provisions of this act, shall furnish a bond acceptable to the state highway commissioner, in a sum equal to the contract price of the work, conditioned upon the satisfactory completion of the same," etc.

Under a commendable practice prevailing in the state highway department, however, each bidder is required to file a preliminary bond in the sum of \$1,000 with his bid, and the inquiry now submitted relates exclusively to the preliminary bond filed by the said J. A. Fredericks. That bond was conditioned to be void, if upon the acceptance of the bid of the obligor and the awarding of a contract to him he should execute the contract in writing for the construction of the work in accordance with the plans and specifications and should file a further bond for the faithful performance of said contract. The said J. A. Fredericks executed the contract in writing and filed the bond for the faithful performance of the same. It is true that the surety company on his bond as contractor subsequently withdrew therefrom, alleging false representation on the part of the said J. A. Fredericks. This action on the part of the surety company occasioned some delay to the state in having the highway in question constructed.

Inasmuch, however, as the peculiar situation arising in this case is not the kind of a contingency the giving of said preliminary bond is intended to guard against, and in view of the fact that the principal in said bond seems to have done what he could do to comply with the terms thereof, in my opinion, it would be an unwarranted hardship on the surety to attempt to enforce collection from him of the amount of said



bond. Cases may frequently arise in which proceedings should be instituted on bonds, such as the one in question, but under the peculiar facts and circumstances existing with reference to the situation now presented, I am of the opinion that in this particular case no proceeding should be instituted.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

### Liability of Innkeeper for Offensive Acts of Employes.

The decision of the First Appellate Division of the New York Supreme Court in *De Wolf v. Ford* has excited much discussion in the newspapers. It appears that the decision turned largely on a question of pleading. The complaint was dismissed on the defendant's motion without taking any evidence, and, as Mr. Justice McLaughlin remarks, "whether or not the rulings were correct must be determined in the same way as if the defendant had demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action." It was alleged that the defendant managed and controlled a hotel for the entertainment of guests for hire; "that on the fifth day of June, 1905, this plaintiff, in company with her daughter and her brother, one George Catlin, called at said hotel and applied for rooms, giving their true and proper names and stating their relationship of each to the other; that the plaintiff and her brother and daughter were thereupon received as guests of said hotel and this plaintiff assigned to a room therein accordingly; that thereafter, and about 1 o'clock in the morning of the next day, while plaintiff was occupying the room so assigned to her, one of the servants, employes, and agents of the defendants, while in his regular employment at said hotel, forced his way into the said room of this plaintiff, without her consent and against her protest, while she was undressed and without clothing, except her night-dress, and addressed to her, and in the presence of her said brother and another person, vile and insulting language, and accused her of being a disreputable person, and addressed to her words imputing that she was guilty of improper and immoral conduct, and in-

sulted her in many other ways . . . and, furthermore, ordered her to leave said hotel, and threatened to publish her name in the daily papers as a disreputable person."

Mr. Justice McLaughlin thinks that this complaint states a cause of action, and certainly, if the allegation—one of the servants, etc. for the defendant, "while in his regular employment at said hotel, forced his way," etc.—is sufficient to raise the issue whether the employe was acting within the scope of his authority, the case presents a very different question from that passed on in the able opinion of Judge Sanborn, writing for the majority of the United States Circuit Court of Appeals, Eighth Circuit, in *Clancy v. Barker*, 137 Fed. R. 161, which opinion is referred to apparently with approval in the present opinion of the majority of the Appellate Division. In the *Clancy* case it appeared that a boy about six years of age, a guest of the defendants at their hotel, wandered out of the room assigned to him and into a room in which a bellboy or porter of the defendants was engaged in playing a harmonica for his own amusement, and the latter accidentally or willfully shot the former with a pistol. It was held that the bellboy was not acting within the course or within the apparent or actual scope of his employment at the time of the shooting, and the innkeepers were not liable for the injury so inflicted. This decision turned entirely upon the fact that the servant, who was temporarily off duty and engaged in amusing himself, was not acting within the scope of his authority. In the *De Wolf* case the facts alleged would seem to suggest that the servant might have been charged with the duty of excluding and expelling immoral and objectionable persons from the defendant's hotel, and therefore that the act was within the general scope of employment.

Judge Sanborn's opinion may be commended as an instructive discussion of the subject of the responsibility of innkeepers for acts of their servants. He shows substantial reasons for distinction between the liability of innkeepers and that of common carriers.

"The carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically

the only, occupation of the parties is the performance of the contract of carriage. . . . The carrier regulates the movements of the passengers, assigns him his seat or berth and determines where, how and when he shall ride, eat and sleep, while the passenger submits to the rules, regulations and direction of the carrier, and is transported in the manner the latter directs. . . . The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of the innkeeper with his guest and their relations to each other are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it; but they leave him free to use or fail to use it, and all the other means of entertainment proffered, when and as he chooses, and to retain the uncontrolled dominion of his person and of his movements. The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety."

The learned judge also remarks:

"Moreover, the authorities in the cases involving the liability of common carriers, of

owners of palace cars, of steamboats and of theatres, upon which counsel for the plaintiff seems to rely, when carefully examined, are found to be cases in which the servants were acting within the course or scope of their employment, and they do not rest upon the proposition that the defendants in those cases were liable for the willful or negligent acts of their employees beyond that scope."

It would be unjust as well as unnecessary for general protection to hold an innkeeper liable if a guest go into a part of the building whither he has not been invited, either expressly or impliedly, and be there insulted or injured by an employee who is off duty. This, however, is an entirely different proposition from saying that an innkeeper may not properly be chargeable for acts of insult or injury committed by a servant as incidental to the discharge of regular duties.

In *Gillespie v. Brooklyn Heights R. R.* 178 N. Y. 347, it was held (syllabus):

"A common carrier is liable to damages to a passenger for an injury to his feelings caused by the insulting language of its employee, upon the ground of a breach of its contract which obligates it not only to transport the passenger, but to accord to him respectful and courteous treatment and to protect him from insult from strangers and its own employees. Among the elements of damages in such a case and which may be considered in determining their amount are the humiliation and injury to his feelings suffered by him, not, however, including any injury to his character resulting therefrom, and he is entitled to recover compensatory damages only, not including punitive or exemplary damages."

In *Davis v. Tacoma Ry. & Power Co.*, 77 Pac. 209, it was held by the Supreme Court of Washington that although a person operating a place of public resort may have the right to exclude persons whose conduct, dress or demeanor proclaim them to be members of a disreputable class, that fact does not exempt from liability for a mistake made in the effort to exercise that right, and that in an action for the wrongful exclusion of a person from such a resort, mental suffering is a proper element in the estimation of damages. This latter case is quite substantially similar to that presented in *De*

*Wolf v. Ford.* It is true that the defendant in the Washington case was a common carrier, being a street railway company that had acquired and was operating a park or place of resort in connection with its railway, and the wrongful action complained of occurred in said park. If, however, the act of the servant of an innkeeper performed within the scope of his authority may be legally classable with that of the servant of a common carrier, the Washington case, which has often been cited with approval, bears instructively upon the New York case under consideration.

It is desirable that the questions raised by the decision in *De Wolf v. Ford* be taken to the Court of Appeals, as trial courts and even intermediate appellate tribunals are loath to make serious innovations upon the common law. We gravely doubt whether the court of last resort will hold that no contract for decent treatment and protection from insult or injury on the part of employes may be implied from the relation of innkeeper and guest. The decision in the Gillespie case (*supra*) reversed that of the Appellate Division and quite materially extended the protection of passengers against misconduct of employes. It is not improbable that the Court of Appeals will similarly harmonize the common law with existing popular sentiment on the subject of the liability of innkeepers. It is questionable whether the Court of Appeals would now sanction the invasion by an innkeeper, or his servant acting within the general scope of duty, of the privacy of woman's bedroom. If such an extreme measure be necessary for the preservation of decency, good morals and the reputation of a hotel, at least there should be charged upon the innkeeper liability in damages in case of mistake.—*New York Law Journal.*

Making the procurement of a license prerequisite to engaging in the plumbing business is held, in *Douglas v. People ex rel. Ruddy* (Ill.) 8 L.R.A. (N.S.) 1116, to be within the police power, and not to violate the constitutional provisions against the deprivation of liberty or property without due process of law.

Under a trust to ascertain and divide the net income of an estate at yearly intervals, the estate of one dying before a division period is held, in *Green v. Bissell* (Conn.) 8 L.R.A. (N.S.) 1011, not to be entitled to an allotment when the period arrives.

The power of the legislature to provide for substituted service of process by publication and mail upon a resident of the state, in an action for tort, who cannot be personally served in the county where the suit is brought, is sustained in *Nelson v. Chicago, B. & Q. R. Co.* (Ill.) 8 L.R.A. (N.S.) 1186.

A statute imposing an inheritance tax on successions for the support of public schools, in compliance with the constitutional direction, is held, in *Succession of Levy* (La.) 8 L.R.A. (N.S.) 1180, not to be objectionable as retroactive legislation divesting vested rights, as to successions opened, but not settled, at the time the law took effect.

The proceeds of an insurance policy issued by a New York company to a resident of New Jersey, in which latter state the company has an agent on whom process may be served, is by the New York Court of Appeals in *Re Gordon's Estate*, 79 *Northeastern Reporter*, 722, held not subject to the New York transfer tax, principally on the ground that the proceeds of the policy could be collected by suit in New Jersey without invoking the aid of the New York courts.

Where, in an action brought by a creditor in a state court to establish the validity of a mortgage upon a bankrupt's stock in trade, final judgment that it constitutes an invalid preference under the bankruptcy act is rendered in favor of the trustee after the expiration of the year subsequent to the bankrupt's adjudication, it has been held, in *Re Noel*, 18 *Am. B. R.* 10, that the claim of the creditor is "liquidated by litigation" within the meaning of section 57n of the bankruptcy act, and he is entitled to prove the same as an unsecured debt, at any time within 60 days of the rendition of the judgment in the state court action.

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No. 21.

PITTSBURGH, PA., DECEMBER 4, 1907.

## Orphans' Court,

ALLEGHENY COUNTY.

### In re Estate of ADOLPH LORCH, Deceased.

*Tax sale—Practice—Service of sci. fa.—Proceedings under act of February 24, 1871, P. L. 126—Purchaser without notice of trust.*

The city of Pittsburgh assessed taxes accruing after the death of L., who was then the registered owner of the lot, in his name. Sci. fa. issued returned "premises posted nihil as to defendant." Alias sci. fa. issued returned "served by leaving a true and attested copy of this writ at the residence of L. with adult member of the family." Judgment taken by default. Lev. fa. issued. Sale made to V., who had been L.'s widow, but was then remarried.

Held (1) That under the act of February 24, 1871, P. L. 126, the taxes were properly assessed and sci. fa. issued against L.

(2) That the return to the alias sci. fa. showed a good service.

(3) That the lev. fa. properly issued without sci. fa. to L.'s personal representatives, distinguishing Cadmus v. Jackson, 52 Pa. 106.

(4) That a purchaser on foreclosure of mortgage given by V. and her husband took good title to the lot.

No. 1 June Term, 1907. Sur exceptions to decree for partition.

Opinion by OVER, J. Filed November 14, 1907.

The admitted facts in this case are these: Adolph Lorch died intestate September 9, 1890, leaving to survive him a widow, Annie, and four children. He owned at the date of his death the lot described in the petition for partition, located in the Sixteenth ward of the city of Pittsburgh, and it was then registered in his name as owner in the city engineer's office, and continued to be so registered until after the sheriff's sale

of the lot hereafter referred to. The city taxes of 1892 were levied on the lot in his name, and having become delinquent a lien was filed therefor and a scire facias issued against Adolph Lorch returnable to the first Monday of February, 1894, upon which the sheriff returned "premises posted nihil as to defendant." An alias scire facias was then issued against the same defendant to the first Monday of July, 1894, and returned "Served June 12, 1894, by leaving a true and attested copy of this writ at the residence of Adolph Lorch with adult member of the family." Judgment was taken by default, lev. fa. issued, and June 7, 1895, the lot was sold by the sheriff for \$350 to Annie Voll, the widow of Adolph Lorch, who had remarried, and who was also administratrix of his estate, and deed was delivered to her. She and her husband subsequently executed a mortgage to the Penn Loan Association, the respondent, which was foreclosed and the lot purchased by it.

The Penn Loan Association in its answer to the petition for partition filed in this case averred that the title to the lot was in it; but it was held by the court that it only had title to the widow's interest, and a decree for partition was made to which exceptions have been filed, and the cause is now heard upon these exceptions.

Although the taxes for which the lien was filed were assessed after the death of Adolph Lorch, under the act of February 24, 1871, P. L. 126, the lien was properly filed in his name. It is entitled "An act providing for the registry of lots in the city of Pittsburgh," and the fourth section provides that "It shall be the duty of all owners of houses and lots or tracts of ground to furnish forthwith descriptions of their property to the engineer to aid him in making up his book of plans, and whensoever such description shall have been furnished and the certificate of the engineer or his assistant shall be received, no property so returned shall be subject to sale for taxes or other municipal claims thereafter to accrue as a lien of record thereon except in the name of the owner as returned, and after recovery by suit and service of the writ on him as in case of a summons, scire facias or other appropriate

writ;" and the eighth section, that "If neither the seller or buyer, devisee or heir, or other party, who has acquired a title to houses or lands in the said city, nor the officers above named, shall have furnished the description of the property sold as aforesaid, both he who may have parted with and he who acquired title shall be liable for the taxes and assessments thereafter assessed thereon . . . and if the lands or houses sold be afterward sold for taxes or assessments thereafter accruing as a lien of record before said duty shall have been performed with(in) the name of the former owner the purchaser shall acquire title of said owner and all claiming under him."

The purpose of the act evidently was to give the city authorities correct information as to the owners of lots so that taxes could be levied and assessments made in their names, and as it appears from the registry of deeds in the city engineer's office when the taxes were assessed and the lien filed in this case that Adolph Lorch was the owner, the city had the right to rely on this information, especially as under the eighth section it was the duty of the widow and children to have their names registered as the owners of the property.

The next question is whether the scire facias issued on the lien was properly served. The fourth section provides that "the writ shall be served upon the registered owner as in the case of a summons, scire facias or other appropriate writ," and the eighth, that "the purchaser at the tax sale shall not acquire the title of such persons who shall have performed said duty (i. e. registering the names of the owners), or of his heirs or assigns, unless the sale shall have been made in the name of such owner, after service of process upon him, as in the case of suit by summons, scire facias or other appropriate writ." The first writ was returned "premises posted nihil as to defendant," and had the same return been made on the second writ the service would have been good: *Ferguson v. Quinn*, 123 Pa. 337-346; but it was returned "served June 12, 1894, by leaving a true and attested copy of this writ at the residence of Adolph Lorch with an adult member of his family." This was a good service under the 2nd and 39th sections

of the act of June 13, 1836, is conclusive and cannot be contradicted: *Park Bros. & Company v. Oil City B. W.*, 204 Pa. 453. The service being good the judgment was good, even if voidable; but it is contended that as Lorch was dead, the execution was void because no sci. fa. had issued against the personal representatives: *Cadmus v. Jackson*, 52 Pa. 106. In *Taylor v. Young*, 71 Pa. 81, Thompson, Chief Justice, said: "I shall not discuss the point whether it (the tax sale in *Cadmus v. Jackson*) ought to have been declared void or voidable." The facts of the case at bar, however, differ from those in *Cadmus v. Jackson*, supra, as there was no law there as here requiring owners to register their names and the sale to be made in the name of the registered owners. Here the city had no notice of the death of the owner; but on the contrary the information from the return of the sheriff was that he was living, and surely there was no duty devolving on it, nor on the respondent, to inquire as to whether the return was true or false. The execution being good, the sale then vested the title of the lot in the purchaser. But if she were still the owner of the lot, as she was the widow and administratrix of the decedent, it may be she would hold the same in trust for herself and children in the proportions they would take under the intestate laws. She, however, had remarried, taken the name of her husband and took title in the name of Annie Voll. There was nothing to put the respondent on inquiry as to the facts of the case, and as it is a bona fide purchaser for value, it holds the title free of any trust. The proceeding is in rem: *White v. Vallentine*, 96 Pa. 186, and is analogous to a sci. fa. on a mortgage, and it is well settled that a sale of land upon a judgment recovered upon a mortgage confers good title upon the purchaser, although the defendant was dead when the first writ of scire facias issued and the sheriff returned that there was no terre tenant: *Duff v. Wynkoop*, 74 Pa. 300-305. The lot was registered in the name of Adolph Lorch; the taxes were assessed and lien filed in his name; the scire facias was properly served, judgment taken and *levari facias* issued, and sale made in the name of the registered owner; all the requirements of

the act of 1871 complied with. Surely, then, the purchaser acquired as provided in the eighth section of the act, the "title of said owner and all claiming under him."

The exceptions to the decree must therefore be sustained and the petition dismissed.

For petitioners, *Herman F. Ruoff*.

For Anna Voll, *J. M. Hunter*.

For Penn Loan Association, *A. M. Thompson*.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### **GUARANTEE LOAN & INVESTMENT ASSO. v. KOTCHEY et ux.**

*Mortgagees—Equities of—Satisfaction of first mortgage—Mistake—Revocation of satisfaction.*

Where a third mortgage is placed without the knowledge of an intervening second mortgage, and part of the consideration of the third mortgage is the satisfaction of the first, a petition praying for the revocation of the satisfaction of the first mortgage and assignment of it to the owner of the third mortgage, will be granted upon discovery of the second mortgage and where it appears that no money was advanced on the second mortgage nor any interest paid thereon.

In such a case a sale of the property on the first mortgage, after the revocation of the satisfaction and its assignment, divests the property of the lien of the second mortgage.

No. 485 October Term, 1907. Case stated.

Opinion by FRAZER, P. J. Filed September 23, 1907.

In substance, the facts agreed upon in the case stated are as follows: Edward Hendricks, being the owner of lot No. 16 in Burns plan, recorded in Plan Book Vol. 8, page 220, mortgaged the same on July 27, 1892, to the Order of Solon to secure the payment of an indebtedness of \$500. On August 6, 1896, Hendricks placed a second mortgage upon the property in favor of Charles E. Cornelius to secure the sum of \$2,500. On April 3, 1907, Hendricks conveyed the property to his wife, Catherine Hendricks, and thereupon joined with her in executing a mortgage to plaintiff to secure an indebtedness of \$1,000. At the time of executing

and recording last mentioned mortgage plaintiff paid to the Order of Solon the amount of its mortgage debt and interest for the purpose of making plaintiff's mortgage a first lien, and thereupon that mortgage was satisfied. Subsequently, upon failure of Hendricks and wife to pay interest to plaintiff, its mortgage was foreclosed and the property sold by the sheriff, plaintiff becoming the purchaser. After acquiring title to the property plaintiff entered into an agreement with defendants whereby the property was sold to defendants for the sum of \$1,500, payable \$150 cash and the balance in monthly installments of \$15, with interest, which consideration defendants have paid with the exception of \$45 with interest from April 13, 1907, on \$90, which sum is due and unpaid. Subsequent to the agreement and sale of the property to defendants, plaintiff for the first time learned of the existence of the mortgage in favor of Charles E. Cornelius. Upon learning of that mortgage plaintiff presented its petition to this court asking that the satisfaction of the Order of Solon mortgage be cancelled and that the same be assigned to plaintiff. Upon that petition a rule to show cause was granted upon all parties, including Catherine S. Cornelius, executrix of the estate of Charles E. Cornelius, to which petition answers were filed by the receiver of the Order of Solon and Mrs. Cornelius. The receiver made no objection to the order being made as prayed for. In the answer of Mrs. Cornelius it appeared that there was no record upon the books of Mr. Cornelius of the Hendricks mortgage or any entry tending to show that any money had been advanced by Mr. Cornelius during his lifetime upon the mortgage, or that interest had been paid thereon. The answer further sets forth that she was not aware of the existence of the mortgage until the same was called to her attention by those proceedings. It also appeared that search had been made for Hendricks and his wife, but that they could not be found. After consideration of the matter, an order was made by this court directing that the satisfaction of the mortgage of Hendricks to the Order of Solon be stricken from the record and that the mortgage be marked assigned to plaintiff. After

that order had been made plaintiff issued a sci. fa. upon the mortgage and at the sheriff's sale became the purchaser of the property.

The sole question here is whether or not the sale upon the mortgage of the Order of Solon divested the mortgage standing in favor of Charles E. Cornelius. If that mortgage was divested, judgment is to be entered in favor of the plaintiff for the sum of \$45 with interest from April 13, 1907, on \$90. If the mortgage was not divested by that sale, then judgment to be entered for defendants. It seems to us the Cornelius mortgage was divested by the sale. This court's right to strike off the satisfaction of a mortgage when the same was had either from fraud or mistake, is clear.

In this case, from an examination of the petition and answer upon which the satisfaction was stricken off and the assignment directed, it appears that the satisfaction was an error, that the payment of the Order of Solon mortgage was made solely for the purpose of making the mortgage to plaintiff a first lien upon the premises described. As no money was advanced upon the Cornelius mortgage and no wrong was done any party by striking off the satisfaction of the Solon mortgage, it seems to us plaintiff by virtue of the sheriff's sale took the property discharged from the lien of the Cornelius mortgage.

In view of this conclusion, we are of opinion that judgment should be entered in favor of plaintiff, and it is ordered that judgment be now entered in favor of plaintiff and against the defendant for the sum of \$47.25, together with costs of suit,

For plaintiff, *White, Childs & Scott*.

For defendant, *Henry Myers*.

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(Common Pleas No. 2, Allegheny Co.)

### SHICKLER v. DIES.

*Apartments—Act of March 30, 1903—Interpretation of.*

The eleventh section of the act of March 30, 1903, P. L. 113, relating to the construction of tenement and apartment houses, requires a separate water-closet for each suite of rooms or apartment, intended for the use of those rooms exclusively, which is not connected with any other apart-

ment. It does not require an independent hallway leading to each water-closet, affording a separate entrance to the closet from each room of the apartment.

No. 457 October Term, 1907. Sur demurrer to answer to writ of mandamus.

Opinion by FRAZER, P. J. Filed September 19, 1907.

Plaintiff's petition alleges, inter alia, that he is the owner of certain lots of ground situate in the Fourteen ward of the city of Pittsburgh, and that he is desirous of erecting upon the property two three-story brick apartment houses containing together forty-eight rooms; that he had plans prepared for the same, and in compliance with the act of June 7, 1895, presented the same to the superintendent of the bureau of building inspection for approval, and on August 1, 1907, received from John P. Brennan, assistant superintendent of the bureau, notice in writing refusing to approve the same because, as alleged, "the plans submitted do not conform to laws on tenement houses." The answer of defendant admits the allegations set out in the petition and further sets forth that an approval of the plan was withheld because it failed to provide for an independent hallway leading from the main hallway to each water-closet in each separate apartment.

The eleventh section of the act of March 30, 1903, P. L. 113, provides as follows:

"In every such tenement house, whenever a connection with a public sewer is in any way possible (and of this possibility the bureau of health of said cities shall be the sole judge) there shall be one water-closet for every tenement or suite of rooms, which has its own independent hallway, so separated that its rooms do not open into or connect with any other rooms; there shall be at least one water-closet for every three rooms . . . every water-closet shall be separated from every other water-closet, and shall have an entrance entirely independent of the entrance to every other water-closet," etc.

The plan attached to the petition shows twelve separate apartments of four rooms each and a bathroom, the latter in each case containing a water-closet. The language of the act is "there shall be at least one water-

closet for every tenement or suite of rooms which has its own independent hallways, so separated that its rooms do not open into or connect with any other rooms." This, we take it, refers to a suite of rooms which has its own independent hallway so separated that its rooms do not open into or connect with any other rooms, and does not refer to bathrooms containing a water-closet—in other words, the statute does not require an independent hallway leading to each water-closet, affording a separate entrance to the closet from each room of the apartment as claimed by the building inspector. What is required is a separate water-closet for each suite of rooms, intended for the use of those rooms exclusively, and not connected with any other apartment. This, it seems to us, the plan provides for, except possibly a door connecting the halls leading to the bathrooms connected with the rear apartments. This objection, however, petitioner has agreed to correct. With the understanding that a partition wall is substituted for the door referred to, the demurrer is sustained and a mandamus ordered to be issued as prayed for.

For plaintiff, *Hall & Metcalf.*

For defendant, *W. B. Rodgers and L. S. Levin.*

## Executive Department,

HARRISBURG.

### EMPLOYMENT OF MINORS.

*Child labor—Employment affidavits—Acts of May 29, 1901, and May 2, 1905.*

The act of May 29, 1901, P. L. 322, as modified by the provisions of the act of May 2, 1905, P. L. 352, which have not been declared unconstitutional, regulates the employment of child labor; and employment affidavits must conform to the requirements of these acts.

Request of Chief Factory Inspector Delaney for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed July 30, 1907.

I am in receipt of your letter of June 24th, enclosing two forms; first, form of "Employment Certificate" designated as "Form

6, original," prepared in accordance with the provisions of the act of May 2, 1905, P. L. 352; second, form of "Employment Affidavit," designated as "New Form 6," prepared by your department to meet the situation existing subsequent to the decisions of the Superior Court of Pennsylvania in the case of *Collett v. Scott*, 30 Super. Ct. 430, and of the court of quarter sessions of Philadelphia county, in the case of *Commonwealth v. Hoopes*, 15 D. R. 894.

You state in your communication that by reason of these decisions you have abandoned the use of the form first above referred to, viz: "Form 6, original," and have adopted the use of the second form referred to, viz: "New Form 6." You ask to be advised by this department as to whether said "New Form 6" meets the requirements of law, the enforcement of which is one of the duties of your department.

The blank submitted for consideration and designated as "New Form 6" is as follows:

"New Form 6.

It is unlawful to issue the following for a child under fourteen years of age.

PENNSYLVANIA.

#### EMPLOYMENT AFFIDAVIT

for

.....  
Personally appeared before me,.....  
of No..... street,.....  
who being duly

sworn, swears

affirmed, affirms

that ...he is the.....  
of ....., who is..... years of age  
and was born on the .....day of.....  
in the year 189..., in.....

Sworn or affirmed and subscribed before me this  
..... day of ....., 190...

.....  
.....  
.....

N. B.—Properly executed by a person authorized to administer oaths, the above is a legal warrant for the employment of the child named therein in any establishment in



the State of Pennsylvania, as per act of assembly approved May 29, 1901, as changed by the act of May 2, 1905, which reads: "It shall be unlawful to employ any child between the ages of fourteen and sixteen years without there is first provided and placed on file an affidavit made by the parent or guardian stating the age, date and place of birth of said child. If said child have no parent or guardian, then such affidavit shall be made by the child, which affidavit shall be kept on file by the employer, and shall be returned to the child when employment ceases."

Sections 5 and 6 of the act of May 2, 1905, authorizing public school teachers to issue employment certificates are not in force, the court having declared them to be unconstitutional.

J. C. DELANEY,

Chief Factory Inspector, Harrisburg, Pa.  
June, 1907.

\*Erase "sworn" and "swears" if the affiant affirms, and vice versa.

A proper reply to your inquiry requires a somewhat detailed investigation of the provisions of the law relative to the employment of children in so far as that subject is concerned with, or related to, the duties imposed upon you as chief factory inspector of the commonwealth.

By the act of assembly of May 29, 1901, P. L. 322, an act passed for the purpose, *inter alia*, of regulating the employment of children, it is enacted in the second section thereof that "No child under thirteen years of age shall be employed in any factory, manufacturing or mercantile industry, laundry, workshop, renovating works, or printing office within this state." Section three of this act provides, in substance, that it shall be unlawful for any such establishment to hire or employ any child between the age of thirteen and sixteen years, unless there is first provided and placed on file an affidavit stating the age, date and place of birth of said child. By section four of said act, it is provided that

"All persons authorized to administer oaths must examine all children as to their ability to read and write the English language. After a careful examination, if a

child is found unable to read and write the English language, or has not attended school as required by law, or is under thirteen years of age, it will be unlawful to issue a certificate; and in no case shall the officer who executes certificates charge more than twenty-five cents for administering the oath and issuing the certificate."

This act of 1901 was followed by the act of May 2, 1905, P. L. 352. The act of 1905 is also an act regulating, *inter alia*, the employment of children in all kinds of industrial establishments. By the first section of the act, the term "establishment" is defined to mean any place within this commonwealth other than where domestic, coal mining, or farm labor is employed, where men, women or children are engaged and paid a salary or wages by any person, firm or corporation; and where such men, women or children are employees in the general acceptance of the term.

Section 2 of the act of 1905 provides that "No child under fourteen years of age shall be employed in any establishment." By section 5 of the act of 1905 it is made unlawful for the superintendent, lessee, or other person in charge of any establishment, to employ any child between the ages of fourteen and sixteen years, unless there is first provided and placed on file in the office of the establishment an employment certificate in the form provided by the chief factory inspector, which certificate shall be uniform throughout the state. This certificate, under the terms of said section, may be issued by the factory inspector, or certain school superintendents and principals. By section 6 of the said act of 1905 it is prescribed that the said employment certificate shall state the name, age, date and place of birth, and description (including color of eyes, hair and complexion) of said child; its residence and the residence of its parents, guardian or custodian; the ability of said child to read and write simple sentences in the English language, and that it has complied with the educational laws of the commonwealth and is physically able to perform the work to be required of it. It is provided in section 6 that before any certificate of employment is issued the person authorized to issue the same shall first demand and obtain certain

specified evidence of the age, date and place of birth of the child, corroborated by transcripts of certain records. Where such transcripts of certain records prescribed by said section cannot be obtained, it is provided that there may be substituted therefor a statement signed by the principal teacher of the last school which the child attended, certifying that the child has received instruction in reading, spelling, writing, English grammar and geography, is familiar with the fundamental operations of arithmetic, and has completed the course of study in the common schools prescribed for the first five years or a course of study in other schools equivalent thereto.

By the twenty-fifth section of this act the chief factory inspector is required to prepare the form of the employment certificate, blanks, orders, notices, etc., required by the act. This act is commonly known as the "Child Labor Act," and on the same day upon which it was approved there was also approved an act commonly known as the "Anthracite Coal Act." By the anthracite coal act the employment of children in or about any anthracite coal mine or colliery is regulated, and by sections 5 and 6 of this act somewhat similar provisions are enacted relative to the employment certificates of children seeking employment in or about such mines or collieries.

As I understand the situation, the forms for the employment certificates required by the child labor act were prepared by you and used until the decision of the Superior Court in the case of *Collett vs. Scott*, 30 Super. Ct. 430. By that decision, handed down March 12, 1906, it was held that the fifth and sixth sections of the anthracite coal act violated the provisions of the fourteenth amendment of the federal constitution in that the said act made "a discrimination between minors of the same sex and age, the same mental and physical ability, the same experience in this avocation, and the same educational qualifications, permitting members of one class to obtain employment certificates, without which no minor can be employed at all, upon much easier terms than are required by members of the other class." I also find that on April 11, 1906, you were advised by Hon. Hampton L.

Carson, then attorney general, that, in his opinion, sections 5 and 6 of the said child labor act were also unconstitutional upon the ground that they made a like discrimination between the minors affected thereby.

You state in your said communication that subsequent to this opinion you discontinued the use of the forms of employment certificates prepared and issued under the provisions of the said child labor act, and prepared the form of employment affidavit now under consideration. In the case of *Commonwealth vs. Hoopes*, 15 D. R. 849, Judge Staake pointed out the distinction made by the fifth and sixth sections of the child labor act between minors of the same sex and age, and held that sections 5 and 6 of said child labor act are in conflict with the first section of the fourteenth amendment of the Federal constitution, and must, therefore, be declared unconstitutional.

No legislation was enacted at the legislative session of 1907 affecting the power or duties of your department with reference to the employment of children, but certain amendments were enacted, by two acts approved May 29, 1907, P. L. 314 and 321 respectively, to the compulsory school attendance law, making it unlawful for any person, firm or corporation to employ any child not in attendance at school as provided for by the compulsory school attendance law, providing for certain certificates, and imposing certain duties, and conferring certain powers on attendance officers in connection with this matter. By the amendment to the first section of the compulsory school attendance law, it is provided that the act shall not apply to any child between the ages of fourteen and sixteen who can read and write the English language intelligently and is regularly engaged in any useful employment or service. It seems unnecessary, however, to investigate the provisions of the compulsory school attendance law with reference to the employment of children, as your department does not appear to be charged with any duty under the amendments in question. Confining ourselves, therefore, to the specific inquiry as to the proper form of the blanks to be issued by your department, it becomes necessary to consider the effect of the decisions above referred to with relation

to the unconstitutionality of sections 5 and 6 of the child labor act of 1905. The Act of 1905 is inconsistent in many of its provisions with the original Act of 1901, and, therefore, to that extent repealed the said Act of 1901. The Act of 1905 raised the age limit, under which children cannot be employed, from thirteen to fourteen years, and provided for the issuing of employment certificates in lieu of the employment affidavit provided for in the Act of 1901. The sections providing for the issuing of employment certificates have been declared unconstitutional, but an act is not necessarily void in toto because portions of it are invalid or unconstitutional; for where a section is in purpose and effect a distinct enactment, it may be eliminated altogether without affecting the other sections. The rule is "that where the provisions are so interdependent that one may not operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, the whole must fall; but if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained." *Am. & Eng. Ency. of Law*, Vol. 26, page 570.

In the decision of the Superior Court in the case of *Collett v. Scott*, supra, it is stated "that section 1 of the said anthracite coal act which makes it unlawful to employ any minor under sixteen years inside of any anthracite coal mine, or to employ any minor under fourteen years in any anthracite coal breaker or colliery, or around the outside workings of any anthracite coal mine, and section 2, which prescribes the remedy for violation of the provisions of section 1, are a valid and constitutional exercise of the police power and are enforceable notwithstanding the invalidity of the other provisions of the act relative to employment certificates."

The only sections of the child labor act of 1905 which have been declared unconstitutional are sections 5 and 6 and as these sections can be stricken out without necessarily affecting the provisions of section 2, to the effect that no child under fourteen years of age shall be employed in any estab-

lishment, it follows that fourteen years remains as the age limit under which no child can be employed in any establishment.

An unconstitutional act, or section of an act, is in legal contemplation as inoperative as though it had never been passed, and we are, therefore, to regard the provisions of the law with reference to the issuing employment affidavits as they would exist if the unconstitutional fifth and sixth sections of the child labor act of 1905 had never been passed. With the exception, therefore, of the increase in the age limit and the definition of the term "establishment," as contained in the act of 1905, the act of 1901, in so far as its provisions are applicable to the question in hand, is the law of the commonwealth and the form of employment affidavit submitted must be measured by this standard; in other words, the act of 1901 is now in force as modified by the constitutional provisions of the act of 1905.

In reply to your specific inquiry as to whether or not the form of employment affidavit, submitted with your communication and hereinbefore set forth, is in compliance with the present requirements of law which your department is required to enforce, permit me to say that the body of the form is, in my opinion, in substantial compliance with these legal requirements; but I cannot approve the first line at the top of the form, nor the matter printed in the shape of a note at the bottom of the form. The words "it is unlawful to issue the following for a child under fourteen years of age," printed at the top of the form, are correct so far as they go; but, in my opinion, there should be additional words printed on that part of the form. Section four of the act of 1901, which, since sections 5 and 6 of the act of 1905 have been declared unconstitutional, is in full force, except as to the age limit, must be read in connection with section 3 of the act of 1901. Section 3 provides for the placing of the employment affidavit on file, and section 4 provides in substance that all persons authorized to administer oaths in the preparation of the employment affidavits must examine all children as to their ability to read and write the English language. If, after a careful ex-

amination, a child is found unable to read and write the English language or has not attended school as required by law, it is just as unlawful to issue the employment affidavit or certificate as it would be to issue the same if the child were under fourteen years of age.

I am, therefore, of the opinion that the following words should be printed at the top of the form:

"It is unlawful to issue the following for a child under fourteen years of age, or for a child unable to read and write the English language; or who has not attended school as required by law."

I am also of the opinion that the printed matter at the bottom of the form should read as follows:

"N. B. Properly executed by a person authorized to administer oaths, after examination by such person as to the ability of the child to read and write the English language, the above is a legal warrant for the employment of the child named therein, in any establishment of the state of Pennsylvania, in so far as such employment is regulated by the Acts of Assembly approved May 29, 1901, and May 2, 1905, which, together, contain substantially the following enactment: It shall be unlawful for any establishment to hire or employ any child between the ages of fourteen and sixteen years without there is first provided and placed on file an affidavit made by the parent or guardian stating the age, date and place of birth of said child. If said child have no parent or guardian, then such affidavit shall be made by the child, which affidavit shall be kept on file by the employer and shall be returned to the child when employment ceases.

Sections 5 and 6 of the act of May 2, 1905, authorizing public school teachers and factory inspectors to issue employment certificates, are not in force, the courts having declared them to be unconstitutional. In no case shall the officer who executes this certificate charge more than twenty-five cents for administering the oath and issuing the certificate."

If the changes herein suggested are made in the "New Form 6," I am of the opinion that said blank form will then be in accordance with such provisions of the law as it is the duty of your department to enforce.

[Dauphin County Reporter.]

(Executive Department, Harrisburg.)

### PITTSBURG No. 8 COAL.

*Corporations—Application for charter—Protest—Similarity of names—Practice of department of state—Amendment of name.*

Application was made by the "Pittsburg No. 8 Coal Company" for a charter. Protests were filed by the "Pittsburg Coal Company of Pennsylvania," incorporated under the laws of Pennsylvania, and by the "Pittsburg Coal Company," incorporated under the laws of New Jersey and registered in Pennsylvania, on the ground of similarity of names. Held, that letters patent should not be issued, and suggested, that the name be amended to "Pittsburg No. 8 Vein Coal Co." whereupon letters patent should be issued. Where the proper officer of the department having supervision of the granting of charters holds, that there is such a similarity between the name of the proposed corporation and the names of corporations already created under the laws of the commonwealth or duly registered for the purpose of doing business therein, as would lead to confusion and uncertainty in the matters in which the commonwealth is vitally interested and has a right to protect herself, a charter should not be granted by the governor.

The state government is not so much concerned with financial results as to the existing and proposed corporations or the probable effect upon the business of the respective companies, as it is concerned with the question of avoiding confusion in the records of its several departments, and in the prevention of uncertainty in the imposition and collection of state taxes and the service of judicial process. These considerations make the practice uniform.

Request of Governor STURAT for opinion.

Opinion by TODD, Attorney-General. Filed June 5, 1907.

Your letter of May 31 referring to this department for advice the application of the Pittsburg No. 8 Coal Company for a charter, together with the protests filed against said application, has been received.

From the papers on file and the records of the proper offices, it is made to appear that an application in due form was filed for the incorporation of the "Pittsburg No. 8 Coal Company." A joint protest against issuing letters patent on this application was duly filed in behalf of the Pittsburg Coal Company of Pennsylvania, a corporation duly

incorporated under the laws of Pennsylvania and doing business within this commonwealth, and the Pittsburgh Coal Company, a corporation incorporated under the laws of the state of New Jersey and duly registered in the state of Pennsylvania, both of which corporations have their principal office at No. 232 Fifth avenue, Pittsburgh. It is alleged in the protest that the purpose of the incorporation of the said Pittsburgh No. 8 Coal Company is practically the same as that of both protestants and that the similarity in names will lead to confusion and embarrassment both to the protestants and the public, and, further, that the protesting corporations are entitled to protection at the hands of the commonwealth from the incorporation of a company under a name prejudicial to the interests of the protestants.

Hon. John F. Whitworth, corporation clerk, under date of May 20, 1907, filed an opinion with the secretary of the commonwealth, recommending that the applicants for a charter be required to adopt another name for the reason that there are already on the records of the department of the secretary of the commonwealth three companies of practically the same name, viz: Pittsburgh Coal Company, and no more should be incorporated under a similar name if confusion is to be avoided in the several state departments. On the other hand, the applicants for the charter contend that the words "Pittsburg No. 8" are used very extensively to designate the particular vein of coal in which the proposed corporation intends to invest; that this particular vein of coal has a well-known reputation in eastern Ohio and corresponds to what is known as the Pittsburgh vein or seam of coal in western Pennsylvania. The applicants for the charter, therefore, contend that the business they propose to engage in will not interfere with the business of the Pittsburgh Coal Company and that confusion will not arise from the use of the name under which they desire to be incorporated.

In disposing of cases of this nature, it is important that their disposition should rest upon proper considerations in order that a uniform practice may prevail. The state government is not so much concerned with financial results to the existing and proposed

corporations or the probable effect upon the business of the respective companies, as it is concerned with the question of avoiding confusion in the records of its several departments, and in the prevention of uncertainty in the imposition and collection of state taxes and the service of judicial process.

In this case the proper officer of the department having supervision of the granting of charters holds that there is such a similarity between the name of the proposed corporation and the names of corporations already created under the laws of this commonwealth, or duly registered for the purpose of doing business herein, as would lead to confusion and uncertainty in the matters in which the commonwealth is vitally interested and has a right to protect herself. The opinion of that officer seems to be based upon proper grounds, and in the opinion of this department should be sustained.

You are, therefore, advised that the joint protests hereinbefore referred to should be sustained and that letters patent should not be issued to the applicants under the name of "Pittsburg No. 8 Coal Company," but if the applicants for the charter see fit to adopt another name, for instance, Pittsburgh No. 8 Vein Coal Company," or any name that will avoid the difficulties presented by the use of the name now proposed, letters patent should be issued on the application so amended.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

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The power of the legislature to control the appointment of the street commissioners of a city, and impose the burden of maintaining the police department upon the municipality, is sustained in *Arnett v. State ex rel. Donohue* (Ind.) 8 L.R.A. (N.S.) 1192.

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The right of the legislature, in the exercise of the police power, to enact a statute creating a state board of pharmacy, prescribing its duties, and providing for the licensing of pharmacists, and imposing fees for the issuance and renewal of licenses, is sustained in *State v. Hovorka* (Minn.) 8 L.R.A. (N.S.) 1272.

# Pittsburgh Legal Journal

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No. 22.

PITTSBURGH, PA., DECEMBER 11, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### BOROUGH OF GLASSPORT v. RIFFNER et al.

*Boroughs—Councils—Committees—Vacancies—  
Equity jurisdiction.*

Although the rules of council provide for committee appointments for one year, temporary vacancies may be filled temporarily, and the action of the committee so constituted is valid.

Equity has no jurisdiction to enjoin parties from acting as police officers or making arrests, the criminal laws providing for such matters; it will, however, restrain parties claiming to be policemen from interfering with the borough property on bill filed by the borough.

No. 599 October Term, 1907.

Opinion by FRAZER, P. J. Filed October 24, 1907.

The purpose of this bill was to enjoin defendants from attempting to make arrests as police officers of plaintiff borough, from congregating upon the streets and inciting persons to commit breaches of the peace, and from interfering with the officers and property of the borough. From the bill, answers and proofs, we find the following facts:

#### FINDINGS OF FACT.

1. The borough of Glassport is a municipal corporation existing under the general laws of this commonwealth.

2. Defendants, who are citizens of plaintiff borough, were on March 4, 1907, appointed by council of the borough as follows: William J. Riffner, chief of police; John Morrissey, Thomas King, Frank Miser, patrolmen, and William G. Hatfield, turnkey. As such officers they at once entered upon their respective duties.

3. Previous to 1907 the borough of Glassport, which had theretofore been one

election district, was divided into three wards, and at the spring election following, members of council were elected to represent the different wards. Among those who had previously been elected at large and whose terms had not expired were Frank Davis, Rummell, John F. Reed and J. E. Hughes, all of whom resided in the second ward of the borough as divided and continued to act as members of council, Davis and Reed having been elected for three years at the municipal election held in February, 1906, and Rummell and Hughes for the same term at the election held in February, 1905. No councilmen were therefore elected in the second ward at the election held in February, 1907, those elected to represent the first ward being George R. Blose, H. C. Griffin and J. W. Kein; those elected to represent the third ward being Cass, M. E. Randall and Joseph M. Murray, the council consequently consisting of ten members. At its organization on the first Monday of March, 1907, John F. Reed was duly elected president, and has continued to act as such officer since his election.

4. Under the power vested in him as president, Mr. Reed designated the respective committees upon which the members were to serve during the year, as provided by the rules of council. As members of the police committee, H. C. Griffin, Joseph M. Murray and J. E. Hughes were appointed. This committee has supervision over the police force and must approve all bills for supplies for that department and also the monthly payroll for the salary of the chief of police, patrolmen and turnkey.

5. At a meeting of council held July 29th, the chairman stated that during the temporary absence in Europe of Mr. Hughes he would, with the consent of council, temporarily appoint members to serve upon the several committees to which Mr. Hughes had been assigned for the year. Among those temporary appointments was that of George R. Blose as a member of the police committee. There was no objection to the appointments, and the members designated by the chairman acted as members of the respective committees to which they were temporarily assigned until the return of Mr. Hughes.

6. Among the rules adopted by council

for the governing of the police of the borough is Rule 11, which reads as follows: "Any of the following named offenses will subject the officer guilty thereof to be suspended by the police committee or discharged by the police board." Among the offenses named are, "(c) Wilful disobedience or using disrespectful language to a superior officer;" "(e) of neglect of duty," and "(g) of neglect or disobedience of orders."

7. Complaint having been made to members of council that members of the police force were not enforcing the laws and ordinances of the borough, the matter was brought before the police committee at a meeting held August 15, 1907; after hearing the committee suspended Chief of Police Riffner, and reported its action to a meeting of council held August 22, 1907, whereupon the action of the committee was ratified and the suspension approved by vote of five in the affirmative to two in the negative. Upon the adoption of the report by council, I. N. Blosser was elected temporary chief of police, receiving seven votes, and the following day entered upon the discharge of his duties as such officer.

8. At the meeting of council held August 22nd, charges were preferred by a member against each of the patrolmen and the turnkey, which charges were referred by council to the police committee, which committee subsequently held a meeting and suspended the patrolmen and turnkey. This action was reported to council at a meeting held August 31st, and according to the minutes the action was ratified, there being, however, but five members present at the time, all of whom voted to ratify the report of the committee in suspending the officers. Each suspended officer received notice in writing from the borough clerk of the action taken by both the police committee and council.

9. On August 24, 1907, William J. Riffner was notified in writing, signed by the borough clerk, of his suspension as chief of police, and also of the election of I. N. Blosser as his successor. Riffner refused to recognize Blosser's appointment, and declined to deliver to him the badge carried by Riffner, which was the property of the borough, when requested to do so by Blosser.

10. On the evening of August 24th the patrolmen, as was their custom to do, failed to report at the station-house for orders before going on duty. Subsequently, Chief Blosser met defendant, Thomas King, notified him of Blosser's appointment as chief and requested King to come to the station-house for consultation. King refused to recognize Blosser as his superior officer, and upon Blosser attempting to deprive King of his mace, King and Morrissey arrested Blosser, took him to the lockup and with the assistance of Riffner, who broke the lock upon the door of the station-house, imprisoned him.

11. Defendants refused to recognize Blosser and other officers appointed by council in place of defendants; declined to deliver to the borough the badges and maces which belonged to the borough, and continued to defy those officers and interfere with them in the discharge of their duty until enjoined by this court. Since the restraining order was granted, Blosser and the new patrolmen have been acting as officers of the borough.

#### CONCLUSIONS OF LAW.

1. Defendants' contention is that their discharge was illegal because, as they claim, there was not a quorum present at either the meeting of the police committee which suspended them or the meeting of council which ratified the committee's action. This contention, so far as the committee's action is concerned, is based upon the temporary appointment by the president of council of Mr. Blose as a member of the committee, to serve during a short absence in Europe of Mr. Hughes, who was appointed a member of the committee at the organization of council. The claim, in our opinion, cannot be sustained. While the rules of the body provide for the appointment of members on committees "for the year," we find nothing that prohibits temporary assignment in case of absence of members. In this case the appointment of Mr. Blose to the police committee was made by the president at the request of Mr. Hughes, and when announced in council was not objected to by a single member. The appointment was not intended to be permanent and thereby increase the committee's membership, but was made

for the purpose of facilitating the business of the police department of the municipality and enabling the officers to receive their pay without awaiting the return home of Mr. Hughes to approve the monthly payroll. The temporary selection of Mr. Blose was not in conflict with any law and under the circumstances, in our opinion, was within the power of the president of council to make the assignment, especially when his action was not questioned by council. The assignment of Mr. Blose to the committee temporarily having been acquiesced in by council, he became a member of the committee, and with Mr. Murray, constituted a majority. Therefore, their action in suspending the patrolmen and turnkey was legal. Under the rules, the suspension of those officers became effective at once, and continues until reversed by council. This has not been done. If five members of council are a quorum, the suspension is ratified. If such number is not a quorum the committee's action has not been reversed and the officers remain suspended. As to whether five members constitute a quorum of council, we need not determine at this time. As to defendant, Riffner's, suspension there can be no doubt. He was suspended by the committee, which action was approved by council by a vote of five to two, and his successor elected. Whether his suspension by the committee was legal or not is immaterial—he was appointed by council and that body had the right to remove him. That the police committee had the power to suspend defendants, and council the authority to discharge them, we have no doubt, and no matter whether the action of either body was legal or not, defendants had no right to forcibly resist that action. It was their duty to acquiesce, and, if the action of either was illegal, the law afforded them an ample remedy.

2. The bill asks that defendants be enjoined from attempting as police officers to make arrests or otherwise act as officers of plaintiff borough, and from inciting persons to riot or to commit breaches of the peace. This a court of equity has no jurisdiction to do. If defendants attempt to act as officers or incite riots and breaches of the peace they should be arrested and punished as provided

by the criminal code. We are of the opinion, however, that we have jurisdiction, especially under the facts of this case, to enjoin defendants from interfering with the property of plaintiff borough and especially from breaking or forcibly entering its municipal building.

Let a decree be drawn accordingly.

For plaintiff, A. W. Powell.

For defendants, Eaton & Seifert.

(Common Pleas No. 2, Allegheny Co.)

### ROSSO v. WILSON.

*Real estate—Alleys—Right to use—Equity*

X. owning a piece of ground conveyed three parcels of it, locating an alley along the rear of the land; the fourth parcel was conveyed without reference to an alley, the alley running to the edge of it. All four lot owners used the alley in common for forty years. Held, that the alley was dedicated to the use of the four lots.

Any lot owner making an improper use of the alley may be enjoined from so using it.

No. 923 July Term, 1907.

Opinion by YOUNG, J. Filed October 30, 1907.

This was a bill filed for the purpose of restraining the defendant from interfering with the plaintiff in the possession and use of a certain strip of land used as an alley in the rear of plaintiff's property, and also to restrain the defendant from using or enjoying it.

#### FINDINGS OF FACT.

1. George A. Baird became the owner in the year 1837 of a certain piece of land fronting 160 feet on Smithfield street in the city of Pittsburgh, lying between Water street and First avenue, and extending back preserving the same width a distance of 90 feet.

2. George A. Baird, by his deed dated March 26, 1863, recorded in Deed Book Vol. 157, page 611, granted and conveyed unto Martin W. Rankin a portion of the land, being a lot on the corner of Smithfield street and First street, having a front of 21 feet more or less on Smithfield street and running back of the same width 70 feet to an alley, with the right to the use of (in common with others) the alley aforesaid;



and on March 1, 1864, Baird, by his deed recorded in Deed Book Vol. 169, page 609, conveyed to Sarah A. Smith a portion of the lands, being a lot beginning on Smithfield street 21 feet from First street, thence along Smithfield street 20 feet towards Water street and running back preserving the same width 70 feet more or less to an alley, with the right to the perpetual use of the alley aforesaid in common with other owners of the lots lying on said alley; and on April 2, 1864, the said Baird by deed recorded in Deed Book Vol. 174, page 30, conveyed unto John I. House & Company a portion of the land, being a lot beginning on Smithfield street 41 feet from First street, thence along Smithfield street 20 feet towards Water street, thence parallel with Water street 70 feet more or less to an alley (with the right to the use of said alley running from First street in common with other owners of lots on said alley), thence by said alley parallel with Smithfield street 20 feet towards First street, thence parallel with First street 70 feet more or less to the place of beginning; and on March 29, 1864, Baird by his deed recorded in Deed Book Vol. 170, page 337, conveyed to Thomas Bailey a portion of said land, being a lot of ground situate on Smithfield street 61 feet from First street, thence along Smithfield street 20 feet towards Water street, and thence preserving the same width and running back 90 feet.

3. By said conveyances to Rankin, Smith and House, an alley was laid out extending 20 feet in the rear of those three lots for the use of the owners of those lots and their successors in title.

4. The deed of Baird to Bailey conveyed to Bailey to a depth of 90 feet from Smithfield street, and comprised the whole depth owned by Baird, and that deed made no mention of or reference to the alley.

5. The title to the four lots above described finally became vested in the following persons, who are now the owners thereof, namely: the Rankin lot at the corner of First Avenue and Smithfield street, in J. K. Lanahan; the Smith lot, in Sarah A. Smith; the House lot, in John Wilson, and the Bailey lot in John Wilson.

6. On the third day of February, 1905, the title to what has been described as the

House lot became vested in John J. McAllister by deed of Michael F. Maloney, of record in Deed Book Vol. 1277, page 205, and John J. McAllister on the third of February, 1905, executed and delivered to the plaintiff a lease for the term of three years from the first day of April, 1905, of said lot of ground, together with the three-story brick building and storeroom known as No. 12 Smithfield street, erected thereon, and of the premises appurtenant thereto, being said strip of ground in the rear of said lot.

7. The defendant, by himself, his agents and servants, has used the said alley or strip in the rear of the plaintiff's property, not only for the purpose of ingress and egress from and to his building, but also as a dumping ground or receptacle for garbage and the keeping of a turtle-box, against the protest of the plaintiff, and the stench thereof has been at times almost unbearable, and is of necessity a menace to the health of plaintiff and his family and a great annoyance to his guests and customers, he being a licensed hotel keeper. The plaintiff has attempted to build upon said strip of ground in the rear of his lot, and has attempted to prevent the defendant from the use of said alley by building a fence thereon, which was removed by the defendant.

8. The strip of ground or alley in the rear of plaintiff's lot has been open continuously for more than 40 years and during that time has been openly, notoriously and continuously used by the owners and occupants of all of said four lots heretofore described as the Rankin, Smith, House and Bailey lots, and by the public, for an alley. During all this time it has been paved, first with cobblestones and afterwards with cement or concrete, and there has been laid and is now laid and used a sewer for said four lots, to which sewer there are two separate drops open and visible on said alley.

9. The cement or concrete pavement was placed upon the alley under a joint agreement upon the part of the owners or occupants of all of said four lots, including the lot of defendant, and was paid for by the owners of said four lots, including the lot of defendant, jointly, and the sewer was constructed and paid for jointly under a joint agreement between the owners or occupants

of said four lots, including the lot of said defendant.

10. In the year 1893 or 1894 the defendant closed said alley by building on his entire lot, and the alley has remained closed in the rear of defendant's property since that date, but has remained open as above found from the northern boundary of defendant's lot at the distance of 61 feet from First avenue, through to First avenue, a distance of 61 feet.

#### CONCLUSIONS OF LAW.

1. The said alley was dedicated to the common use of said four lots, including the lot of defendant, about 1863, which dedication remains unrevoked.

2. The alley has been openly, notoriously, uninterruptedly and continuously used and enjoyed by the owners and occupiers of said four lots, including the defendant's lot, as and for an alley, a period of forty years, and is being so used at the present time.

3. Both plaintiff and defendant and the other owners of said above described four lots of ground, and their lessees or tenants, are entitled to the free and proper use of said alley in common, for the purpose of ingress and egress, and all other proper purposes.

4. The defendant, by the placing of garbage and by his other acts as found in the first clause of the seventh finding of fact, has made an improper use of said alley; has interfered with the plaintiff in his use and enjoyment of it, and the defendant should be restrained from any further use of said alley except in the way of ingress and egress and other proper use in common with the other owners of the lots, or their lessees or tenants.

5. That the costs of this proceeding should be paid by the defendant.

For plaintiff, *Williams & Edwards*.

For defendant, *Burleigh, Gray & Challener*.

### District Court, United States,

WESTERN DISTRICT OF PENN'A.

In the Matter of ROSE, Bankrupt.

*Bankruptcy—Creditor—Claim not proven—  
Right to examine bankrupt.*

A person who shows that he is a creditor of a bankrupt, as by being named in the schedule or by any other satisfactory evidence, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim.

No. 3272 in Bankruptcy.

Opinion by EWING, J. Filed February 9, 1907.

The question certified here is whether without proving his claim an alleged creditor is entitled to examine the bankrupt?

It appears from the report of the referee that on the 5th of September, 1906, the bankrupt appeared and was duly sworn, and William A. Jordan, Esq., counsel for J. D. Bernd Co., the only creditor named in the bankrupt's schedule, started to examine the bankrupt, when objection was interposed on the ground that said party, the J. D. Bernd Company, "has proven no claim in this case as disclosed by the record and does not [now offer to prove any claim, but has expressly stated through his counsel that they do not propose to prove any claim, because in the opinion of the counsel the indebtedness of J. D. Bernd Company against this bankrupt is not dischargeable by the bankruptcy proceedings, and therefore the said J. D. Bernd Company has no standing at the present time in this proceeding by the referee."

The referee ruled that, "It appearing that the examination of this bankrupt has been adjourned from August 17, 1906, until this date, for the purpose of enabling the J. D. Bernd Company to prove its claim in this case, and it further appearing that no claim has been filed on behalf of said company and that said company is the only person named in the schedules filed by the bankrupt, the referee is of opinion that the said J. D. Bernd Company is not at the present time entitled to examine the bankrupt and the objection is sustained."

While it is alleged in the objection that the counsel for the J. D. Bernd Company stated that they do not propose to prove any claim because in his opinion the indebtedness is not dischargeable by the bankruptcy proceedings, yet that is not stated as a fact by the referee, nor is his ruling based on that, but solely on the ground of the failure first to prove the claim.

In *Brandenburg on Bankruptcy*, Sec. 519, it is said that "any person who shows that he is actually a creditor of the bankrupt, as by being so named in the schedule or by any other satisfactory evidence is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim."

In *In re Walker*, 96 Fed. Rep. 550, a similar question is considered, and it is there held that it is not necessary for any one who appears to be a creditor to prove his claim before he is entitled to an examination of the bankrupt, and is said: "Was there sufficient evidence before the referee to show that the creditor had a provable claim against the estate? I think there was. The claim was listed by the bankrupt as a debt which he was owing, and he was required by section 7 of the act to state under oath the amount of the claim, and the consideration out of which it arose. This, of course, would not establish the claim, nor the right of the creditor to share in dividends; but as to such matters as the examination of the bankrupt, and as against him, it certainly makes out at least a prima facie case that the claim exists and is provable against the estate." The same case rules that a creditor who has not proved his claim is entitled to oppose the discharge of the bankrupt, and if he is entitled to oppose a discharge without proving his claim he ought likewise to be allowed to examine the bankrupt for the purpose of establishing the grounds of his objections.

So also in *In re Jehu*, 94 Fed. Rep. 638, Judge Shiras states: "I know of no provision of the bankrupt act which requires that a creditor must file and prove up his claim before he is entitled to an order for the examination of the bankrupt."

From these authorities it would appear that it is wholly unnecessary to require one who appears to be a creditor of the bankrupt to prove his claim before being entitled to examine the bankrupt, and I therefore conclude that the referee was in error in refusing to permit the examination in this case, and it is directed that such examination, if the creditor so desires, be now allowed.

Of course, the referee will see that the ex-

amination is conducted along proper lines and for legitimate purposes with reference to the bankruptcy proceeding, either to show the condition of the estate of the bankrupt, its whereabouts, amount, etc., or to elicit such matters as might be available in opposition to his discharge, or some other relevant testimony.

For petitioner, *Cassidy & Richardson*.

For creditor, *Chantler & McClung*.

## Executive Department,

HARRISBURG.

### EASTBROOK ROAD.

*Road law—Power of highway commissioner to make contracts—Act of 1905.*

The power of the state highway commissioner to bind the state is limited by the terms of the act of 1905. To enter into any agreement with reference to the application of an appropriation not yet made is beyond his power.

Request of State Highway Commissioner Hunter for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed August 8, 1907.

Your letter of July 22, 1907, enclosing a copy of a letter from A. W. Gardner, Esq. county solicitor of Lawrence county, Pa., containing certain propositions, has been received.

In your communication you state in substance that proceedings were instituted under the act of May 1, 1905, P. L. 318, for the improvement of two separate roads situate in the township of Hickory, Lawrence county, Pa., and known and designated respectively as the Harlansburg road and the Eastbrook road, by the construction of a section of state highway on each of said roads.

That, in compliance with the expressed desire of the commissioners of Lawrence county and the supervisors and citizens of Hickory township, to the effect that each of said roads be improved at one and the same time, surveys, plans and specifications were duly made for the section of each road to be improved under said act, proposals were advertised for, bids received and contracts

prepared, contemporaneously. That you anticipated, at the time said proceedings were being carried on, that an appropriation sufficient to improve both roads would be approved at the session of 1907. That the contract for the Harlansburg road was awarded to Messrs. Nelson & Bucharan, which contract was duly signed by them and by you, and is now being carried out by said contractors.

With reference to the Eastbrook road, you state that Messrs. Robison & Rhodes were the successful bidders, and that a contract was signed by them for the construction of the said section of said Eastbrook road, and submitted to you for your signature, but that the bond required to be filed was not in proper form, and was returned by you to said contractors for correction.

At or about this time, you state, you were informed that the appropriation for the construction of state highways would probably not be as large as you had hoped for, and as you had not yet signed the said contract with Robison & Rhodes, you held the same without your signature having been attached thereto, until the exact amount of the appropriation could be ascertained. You further state that when the exact amount of the appropriation had been ascertained, it became apparent that the amount which could be apportioned to Lawrence county, would not be sufficient to permit of the proposed improvement on the said Eastbrook road, as the roads already completed and under contract will consume all the money available for Lawrence county to June 1, 1909. It is further stated in your communication that the said contractors, Robison & Rhodes, without instructions from you and without having said contract signed by you and delivered to them, commenced work on said Eastbrook road, of which fact you had no knowledge until on or about July 1, whereupon you immediately notified them to quit work, as your department was without funds to provide for the construction contemplated by the proposed contract with them.

You further state that said contractors have done work to the value of about \$3,000 on said road, and that the county commissioners of Lawrence county and the su-

pervisors of Hickory township, being anxious to have the Eastbrook road improved, have submitted several propositions contained in the said letter of the county solicitor above referred to. These propositions are as follows:

1. "The county of Lawrence and the township of Hickory each to pay their proportionate share of the cost as provided by the contract, provided, however, that the state highway department agrees in writing to complete the remainder of the said road not finished and paid for by the said county and township, in accordance with the plans and specifications, out of the first available funds the department may have for the said purpose."

2. "The county of Lawrence, under authority of Sec. 9 of the act of May 1, 1905, P. L. 318, and amendments, to pay the 75 per centum of the contract price agreed to be paid by the state, provided, however, that the state highway department will agree in writing to refund and pay to the county of Lawrence the amount by it so expended out of the first funds available for said purpose."

You ask to be advised whether your department can legally enter into an agreement in accordance with the suggestions contained in either of said propositions.

The situation now existing with reference to the Eastbrook road is unfortunate. Under the act in question every contract authorized to be made by your department must be made in the name of the commonwealth, "and shall be signed by the state highway commissioner, and attested by the chief clerk of the department, and shall be approved as to form and legality by the attorney-general or deputy attorney-general of the commonwealth." Without having a properly executed contract, the contractors in question have apparently in good faith expended a considerable sum of money in the improvement of the highway in question. On the other hand, your power to bind the state is limited by the terms of the said act of 1905. It is expressly provided in Sec. 9 thereof, that if the county commissioners and township supervisors decided that it is advisable to go on with the work proposed, and make the required agreements, "the state highway department may, if the funds at its disposal

permit of so doing, contract jointly with the county, township or townships in which said highway lies to carry out the recommendations of the state highway commissioner."

It appears from the statement of facts contained in your communication, that the funds at the disposal of your department will not permit you to sign the contract. The proposition that the state highway department agree in writing to do certain things, does not impress one as being reasonable. In your official capacity as state highway commissioner, you can only bind the state to perform its part of such contracts as are provided for by the act of assembly, viz.: contracts to pay to the persons or firms constructing state highways, the amount due them for such construction. These contracts can be made only when the funds at the disposal of your department permit of so doing. You can deal only with funds which are now available. To enter into any agreement with reference to the application of an appropriation not yet made is beyond your power. Whether the next legislature will make any appropriation for the construction of state highways or in what terms such appropriation may be made, are purely matters of conjecture. Under the provisions of the law, your power to contract with reference to the construction of state highways in Lawrence county is exhausted. The only remedy I can suggest for the unfortunate situation now existing, is that the county of Lawrence and the township of Hickory, under the authority conferred upon them by Sec. 9 of said act and its amendments, providing "that nothing herein contained shall prevent any county and township from agreeing to appropriate a larger amount for such road improvements than the amount specified in this act," complete the construction of the road in question, paying for the same out of their own funds, in whatever proportion they may agree upon, within the terms of said section; and that you agree to use your best endeavor to have provision made at the next session of the legislature for their reimbursement in so far as the state's share of the cost of such construction is concerned, either by a specific appropriation for that

purpose, or the application of a part of such general appropriation as may be made for road construction, to the payment of the sum thus advanced in behalf of the state by said county and township.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

It has been held, in *McNiel v. United States*, 18 Am. B. R. 18, that upon the trial of an indictment charging that defendant unlawfully, knowingly, wilfully and fraudulently concealed from his trustee the sum of \$250 belonging to the bankrupt estate, testimony that defendant's attorney advised him to keep his business open up to the usual closing time of the day of his adjudication upon voluntary petition is properly excluded; and that an indictment so framed carries with it a sufficient averment that defendant knew that said money belonged to his estate in bankruptcy.

The Washington Supreme Court, in *Abrams v. State*, 88 Pacific Reporter, 327, construes the provisions of the state Constitution, which prohibits the ownership of land by aliens, except where acquired by inheritance, under mortgage in good faith, or in the ordinary course of justice in the collection of debts, and provides in general that conveyances to aliens shall be void. Under this provision the state may, where lands are conveyed to an alien, have the same declared escheated; but if the state fails to do this, prior to the alien's death, the right is lost, and the property descends to the heirs of the alien.

A contract by a manufacturer of cottonseed products, in order to secure the withdrawal of a competitor from his territory, to deliver to him a certain amount of seed during the season, and assume the contract by which the competitor's agency is established, is held, in *Kosciusko Oil Mill & F. Co. v. Wilson Cotton Oil Co.* (Miss.) 8 L. R.A. (N.S.) 1053, to be invalid under a statute defining a trust or combine as, *inter alia*, a combination intended to hinder competition in the purchase of a commodity, and rendering invalid every contract relative to the business of such trust or combine.

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PITTSBURGH, PA., DECEMBER 18, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### WEISBERG v. NUTTRIDGE.

*Real estate—Agreement for sale—Incumbrance.  
Damages—Equity jurisdiction.*

B leased to A certain premises with an option to purchase the property. The premises were subject to an irredeemable ground rent. A filed a bill in equity to enforce the option and require B to deliver the premises free of the incumbrance or allow adequate compensation therefor. Held, that unless A should accept the premises subject to the incumbrance and without compensation therefor the bill should be dismissed.

When a vendee seeks specific execution of an agreement and vendor is unable to convey all he agreed to, the vendee may have the partial interest with compensation for the defect, provided the defect admits of compensation and is not a mere matter of arbitrary damages.

In such a case a court of equity has no jurisdiction to make an award in the matter of damages for the deficiency, which would be making a new contract for the parties.

No. 939 July Term, 1907. Bill in equity.

Opinion of FRAZER, P. J. Filed November 13, 1907.

The purpose of this bill was to compel specific performance of a contract for the sale of real estate. From the bill, answers and proofs we find the following facts:

#### FINDINGS OF FACT.

1. By deed dated February 8, 1886, recorded in Deed Book, vol. 547, page 320, Ephriam Gray and wife conveyed to plaintiff the premises described in paragraph one of plaintiff's bill, subject, however, to an undivided part of an irredeemable ground rent of \$100 per annum, reserved in a deed made by John Finley and wife to James Sharp, dated March 27, 1812, and recorded in Deed Book, vol. 24, page 201.

2. From 1889 until June 2, 1902, the property was used by defendant for hotel purposes. On the latter date defendant sold and transferred to plaintiff the bar fixtures, furniture and other house furnishings, and leased the premises to him for a term of five years with the privilege of a renewal at the expiration of that term for another like term. Immediately after executing the bill of sale and lease above referred to, defendant gave plaintiff an option in writing to purchase the premises at any time within five years from May 1, 1902, for the sum of \$120,000. Subsequent to the execution of the papers above referred to plaintiff secured a transfer of the liquor license held by defendant and took possession of the premises and continued the hotel business therein until May 1, 1906, when he was succeeded by his brother, Andrew C. Weisberg, to whom a license was granted by the Court.

3. On March 9, 1907, plaintiff, through his attorney, notified defendant in writing that he elected to purchase the property under the option of June 2, 1902, and requested defendant to send his title papers to plaintiff's counsel for examination. Defendant thereupon denied plaintiff's right to become the purchaser under the option because of having ceased to occupy the premises as tenant, but expressed a willingness to sell and convey to him on the terms expressed in the option if plaintiff would without delay execute a formal agreement. At several meetings between the attorneys for the parties terms were discussed without reaching a conclusion.

4. On May 11, 1907, defendant, notwithstanding his previous refusal to recognize the option of June 2, 1902, through his attorney, tendered to plaintiff a deed duly executed for the property and demanded payment of the purchase money in accordance with the terms of that option. The deed tendered was made subject to the payment of the undivided one-half part of the ground rent referred to in the first finding of fact. Plaintiff refused to accept the deed because of the ground rent clause and demanded a conveyance free of the same, which defendant declined to give.

5. This bill was thereupon filed, and plaintiff now asks a decree requiring defend-

ant to either convey the property free of the incumbrance of the ground rent or that he be required to abate the purchase price to an extent sufficient to adequately compensate plaintiff for the incumbrance.

6. At the trial the holder of the ground rent testified that he would not accept payment for a proportionate share of the same and release defendant's lot from its lien, and fixed the price at which he would sell the whole at \$5,000.

#### CONCLUSIONS OF LAW.

The law applicable to cases of this kind is well settled. While it has been held that when a vendee seeks a specific execution of an agreement and the vendor is unable to convey all he agreed to, the vendee may have the partial interest of his vendor with compensation for the defect, that, however, is not the universal rule. Before compensation can be allowed for a deficiency it should appear to be a defect admitting of compensation and not a mere matter of arbitrary damages. *Erwin vs. Meyers*, 46 Pa. 96, and *Adams' Equity*, page 91. If the contract is to convey land and there is found to be a deficiency in the number of acres, an abatement may be allowed proportionate to the deficiency, or if there is found to be a mortgage, judgment or mechanics' lien against the property, its amount is easily determinable and an abatement in the purchase price can be made to meet it. These classes of incumbrances can be provided for without doing injustice to either party. In the case of a private-way, or drain, or an irredeemable ground rent, the rule is different. In these and similar cases the amount of the deficiency cannot readily be ascertained, and for the Court to fix an abatement, which must necessarily be an award in the nature of damages for the deficiency, would be to make a new contract for the parties, and this equity will not do. Under the law, as we understand it, a court of equity has not the power under the circumstances of this case to fix the value of the ground rent and require defendant to make a reduction on the purchase price of the property to that extent. Consequently a decree as prayed for cannot be made. Defendant, however, having indicated a willingness to convey the premises subject to the

ground rent for the consideration and upon the terms expressed in the option of June 2, 1906, plaintiff can either take the property upon these terms or refuse to do so. A court of equity can require nothing more of the parties. If, therefore, plaintiff within ten days files an agreement in writing to take the property upon the terms above indicated and complete the transfer within twenty days, a decree to that effect will be made, otherwise the bill will be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *Robb & Miller*.

For defendant, *J. T. Buchanan*.

(Common Pleas No. 2, Allegheny Co.)

### GEMPE v. GRIFFIN.

#### *Nuisance—Percolating waters—Equity.*

By owning a lot adjoining and higher than A's lot, built a wall on the dividing line and filled in his lot, which allowed water to percolate through the wall onto A's property. Held, that a bill for an injunction filed by A should be dismissed without prejudice to A's right to proceed for damages at law.

No. 196 October Term, 1907. Bill in equity.

Opinion by SHAFER, J. Filed September 30, 1907.

This bill is by the owner of a lot in the city of Pittsburgh against the owner of an adjoining lot, for an injunction to restrain the defendant from permitting surface water to flow from his land on the land of the plaintiff, and from permitting earth removed from excavations on his land from lying against the plaintiff's wall, and for damages for the injuries already inflicted.

#### FINDINGS OF FACT.

1. The plaintiff is the owner of a lot in the city of Pittsburgh having a front of 20 feet on Olive street and extending back 112 feet along Granite street to Cedar alley, having erected thereon two dwelling houses facing on Granite street. The end of the lot next to Olive street is many feet higher than the end next the alley, and the two houses are on different levels.

2. The defendant is the owner of a lot on Olive street, extending back to Cedar alley along the plaintiff's lot, the natural level of

the defendant's lot being somewhat higher than that of the plaintiff.

3. The defendant recently began the erection of a house on the Olive street end of his lot and in so doing put the earth excavated from his cellar behind his house on the lower part of the lot, thereby raising it some feet above the level of the plaintiff's lot; in so doing, at first by mistake as to the line between the lots, he erected a wall which was some inches at least upon the plaintiff's lot, and threw some earth against one of her houses, but upon discovering his error he took down the wall so built by him and built the wall upon what is admittedly his own land; whether this change was made before or after the filing of the bill it is difficult to say from the evidence, and perhaps is not very material.

4. The plaintiff complains that the filling of the defendant's lot and the building of the wall by him on the edge of his lot have caused more or less surface water to come from defendant's lot by percolation through the wall so as to do her injury; and it appears from the evidence that water did percolate through this wall to some extent after the wall was first built and the fill first made on defendant's lot, and that while the amount of this percolation has diminished, it may not yet have ceased entirely.

#### CONCLUSION OF LAW.

While the plaintiff could, of course, maintain a bill to prevent the casting of earth against her property, we think it somewhat doubtful whether under the circumstances of this case a bill could be maintained to enjoin the plaintiff from doing anything which he has been shown to have done in the way of permitting surface water to come upon the land of plaintiff. We are of opinion that the ends of justice will be served by dismissing the bill without prejudice to the plaintiff's right to proceed at law for any damages she may have sustained, and by directing each of the parties to pay one-half of the costs.

The bill is therefore dismissed without prejudice to the right of the plaintiff to maintain an action at law for the matters complained of in the bill if she desires to do so, and it is ordered that each of the parties pay one-half of the costs.

For plaintiff, *Robb & Miller*.

For defendant, *Marron & McGirr*.

(Common Pleas No. 2, Allegheny Co.)

### BLUMBERG v. GROSS et al.

*Real estate—Agreement for sale—Cancellation, Record.*

B made an agreement to sell C a piece of property, the agreement being recorded. Owing to encumbrances the deal was not put through, C refusing the property unless the encumbrances were removed. C meantime made an agreement to sell the property to A, but this deal failed for the same reason. A later purchased the property from B and filed a bill to have the agreement on record cancelled. Held, the relief prayed for should be granted.

No. 737 April Term, 1907.

Opinion by FRAZER, P. J. Filed November 7, 1907.

This bill was filed for the purpose of having incancelled and stricken from the record articles of agreement for the sale of certain real estate by John B. Larkin to Bernhard Gross, the same being of record in Deed Book, Vol. 1511, page 91. From the bill, answers and proofs we find the following facts:

#### FINDINGS OF FACT.

1. John B. Larkin, being the owner of a lot of ground situate in the Fourteenth ward of the city of Pittsburgh, which is fully described in plaintiff's bill, by agreement in writing dated May 29, 1906, contracted to sell and convey the same to his co-defendant, Bernhard Gross, for the sum of \$17,000, a copy of the agreement being attached to the plaintiff's bill, marked Exhibit A. Two hundred and fifty dollars hand money was paid by Gross to Larkin on the signing of the agreement.

2. Upon examination of the title to the property the attorney for Gross discovered, and so reported, that the premises were encumbered by a party wall on the west side thereof; that the lot, instead of being 137 feet deep, as stated in the agreement, was only 127 feet deep, and that a building on the lot adjoining on the east projected over the Larkin lot to the extent of two inches. Thereupon efforts were made by the parties to relieve the premises of the encumbrances so that the agreement could be carried out. These negotiations continued until about September 1st.



3. On or about September 1, 1906, Mr. Gross' attorney met the attorney of Mr. Larkin and informed him that unless the encumbrances were removed Gross would not take the property, whereupon he was informed by the attorney for Mr. Larkin that the encumbrances could not be removed, and that the deal might as well be considered off. The attorney for Mr. Gross asked that the hand money be returned. This Mr. Larkin's attorney refused to do.

4. On the 9th of October, 1906, Bernhard Gross entered into an agreement in writing with plaintiff to convey to him the Larkin property mentioned in the first paragraph of the bill for the sum of \$17,850, \$500 hand money being paid by Blumberg to Gross upon signing the agreement. On November 8, 1906, Blumberg tendered to Gross the balance of the purchase money and demanded a deed for the property. Gross admitted his inability to make a conveyance of the property, and offered to return the hand money, which Blumberg refused to accept.

5. On October 11 the attorney for Mr. Gross called upon Mr. Larkin at his place of business and informed him that Mr. Gross would take the property subject to the encumbrances, whereupon he was informed by Mr. Larkin that as the property had advanced in price and was worth more at that time than at the time the agreement was entered into he would not sell for the price mentioned in the agreement, whereupon, on October 16, Mr. Gross, through his attorney, tendered to Mr. Larkin the purchase money called for in the agreement, which Mr. Larkin refused to accept.

6. On October 25, 1906, defendant Gross caused the agreement between himself and Mr. Larkin to be recorded in the Recorder's Office of Allegheny county in Deed Book, Vol. 1511, page 91.

7. About November 12, 1906, after the negotiations between Larkin and Gross terminated, Dr. Blumberg opened negotiations with Mr. Larkin for the purchase of the property, and on November 17 purchased the same by articles of agreement for the sum of \$18,500, and received a deed therefor from Mr. Larkin on December 3, 1906, which deed is recorded in the Recorder's

Office of Allegheny county in Deed Book, Vol. 1519, page 328.

8. A. C. Stein, Esq., the attorney for Mr. Gross, was authorized by his client "to make the deal" with Mr. Larkin for the purchase of the property in controversy, and, as testified to by Mr. Gross, "everything was in the hands of Mr. Stein." In the proposed purchase and sale of the lot Gross never met either Mr. Larkin or Dr. Blumberg.

9. About May 22, 1906, H. F. Woodburn, a real estate salesman in the employ of the Real Estate Trust Company, which company had the property of Mr. Larkin in its hands for sale, wrote Mr. Larkin offering him \$14,000 for the premises, which offer was refused. Subsequently, on May 29, Mr. Woodburn called upon Mr. Larkin with an offer from Mr. Gross which he had received through A. C. Stein, Esq., attorney for Gross, and a real estate salesman named Sachs, to purchase the property and pay therefor the sum of \$17,000. This offer was accepted by Mr. Larkin. Thereupon the agreement referred to in the first finding of fact was drawn by Mr. Woodburn and signed by Mr. Larkin. Afterwards Mr. Woodburn acted for Mr. Gross in his negotiations for the sale of the property to Dr. Blumberg, and also advised Dr. Blumberg to negotiate directly with Mr. Larkin for the purchase of the property, after the failure of Gross to carry out his agreement with the doctor. The testimony seems to indicate that Woodburn was at one time or another representing each person concerned in the sale and resale of the Larkin property.

#### CONCLUSIONS OF LAW.

1. The relief prayed for should be granted. There is no valid reason why the agreement complained of should remain of record a cloud upon the title of Dr. Blumberg. The doctor acted in good faith in the matter, and did all he was required to do to carry out his agreement with Mr. Gross. He made tender of the purchase money within the time specified in the agreement and was in no manner responsible for the failure of Gross to acquire title from Mr. Larkin, and Mr. Gross' inability to convey alone prevented the carrying out of the contract. Under these circumstances it would

be inequitable to permit the agreement to remain on the record, especially as Mr. Gross knew the exact condition of affairs at the time he entered into his contract with Dr. Blumberg. If Mr. Gross has suffered any loss by reason of the acts of either Mr. Larkin or Dr. Blumberg they are both financially responsible and he can proceed against them in an action at law.

2. Under the circumstances of this case, the \$250 hand money paid by Mr. Gross to Mr. Larkin should be returned, and the agreement complained of stricken from the record.

Let a decree be drawn accordingly.

For plaintiff, *George J. Kambach, Patterson, Sterrett & Acheson.*

For defendant, *R. B. Petty and A. C. Stein.*

### Court of Common Pleas, CLARION COUNTY.

#### RULOFSON v. FIRST NATIONAL BANK OF CLARION.

##### *Interpleader—Service on non-resident.*

A rule to interplead as to personal property situate in this state may be served upon a non-resident, and this is the case although the interpleader grows out of an action of assumpsit.

A petition for a rule to interplead need not affirmatively aver that the property is claimed by one not a party to the suit, who has sued, or is expected to sue for the same, where the pleadings in the case show such probable matter as lead to a belief that a suit may be instituted for the property.

No. 114 December Term, 1906.

Opinion by WILSON, P. J. Filed October 19, 1907.

A rule to show cause was granted and thereafter duly served on William R. Rulofson in the above stated action of assumpsit of Sarah E. Rulofson against the First National Bank of Clarion, Pa., to appear on a day fixed and show cause why an issue should not be framed between him and Sarah E. Rulofson to determine the ownership of the funds in dispute, to the amount of \$9,553.54, deposited in the First National Bank of Clarion, Pa., and also to show cause why the said funds should not be decreed to

belong and be paid to Sarah E. Rulofson, and judgment entered accordingly. On the return day of the rule a motion was presented for the respondent, W. R. Rulofson, to vacate the order made June 29, 1907, for the service of the rule, to set aside the service thereof; alleging that this Court was without jurisdiction to make an order for the service of the rule upon a non-resident of the state, and also for the reason that the petition for the rule did not allege the money as claimed by one not a party to the suit who has sued or is expected to sue for the same.

The act of June 16, 1836, Sec. 2, P. L. 789, extended throughout the state by act of February 14, 1857, Sec. 1, P. L. 39, conferred upon the courts of common pleas the power and jurisdiction of courts of chancery, so far as it relates to the determination of the rights to property or money, to be claimed by two or more persons in the hands or possession of a person claiming no right of power therein.

The act of April 6, 1859, Sec. 1, P. L. 387, makes it lawful for any court in this commonwealth having equity jurisdiction, on motion of the plaintiff in any suit instituted therein concerning the property mentioned in said act, situate or being within the jurisdiction of such court, etc., to order and direct a subpoena or other process be served upon any defendant or defendants therein then residing or being out of the jurisdiction of such court wherever they may be found, and upon affidavit of such service had to proceed as fully and effectually as if within the jurisdiction of such court. While this act may not apply for the reason that the present action is in the court of common pleas and not a case in equity (as designated in the title of the aforesaid act), yet the personal property in dispute is within the jurisdiction of this court, and under the general equity powers of the court to prevent a failure of justice in our opinion, this court has the right to acquire jurisdiction by service outside of the state of the claimant. The effect of the service of the rule is another matter. It is not contended by counsel for the plaintiff that a personal judgment can be rendered against W. R. Rulofson. The pleadings and copies thereof attached to

the rule and served upon W. R. Rulofson in West Virginia clearly show that the interpleader and the issue sought to be framed is to determine the ownership of the funds now within the jurisdiction. Independent of the aforesaid act of 1859, P. L. 387, the common law courts of this state have jurisdiction over property situate within its jurisdiction, even though owned by a non-resident; and in proceedings against such property jurisdiction to render a valid judgment in rem may be acquired by service outside of the state, but the judgment or decree binds nothing but the property within the jurisdiction of the Court. Ency. of Pleading and Practice, Vol. 19, pages 612 and 613; Harrisburg National Bank vs. Heiser & Foote, 2 Pears. 255; Brewster Practice, Vol. 2, pages 1127-1129.

The act of March 11, 1836, section 4, P. L. 77, provides that the petition or suggestion for the interpleader shall allege the right thereto is claimed by or supposed to belong to some person not being a party to the action (naming him or them), who has sued or is expected to sue for the same, or shall show some probable matter to the Court to believe that such suggestion is true. The petition and pleadings in the case do show such probable matter to believe that such suggestion is true, and therefore it was unnecessary to aver in the suggestion or petition that W. R. Rulofson had sued or was expected to sue such defendant for the same cause of action.

And, now, October 19, 1907, after argument, the rule granted on August 26, 1907, why the order of June 29, 1907, and the service of the rule on the respondent should not be set aside, is hereby discharged at cost of W. R. Rulofson.

For plaintiff, *W. A. & W. W. Hindman and S. K. Clarke.*

For plaintiff, *A. A. Geary and Corbett & Rugh.*

In the case of *Orr Co. v. Cushman*, 18 Am. B. R. 535, it has been held that an action to recover the purchase price of goods sold to defendant as receiver in bankruptcy of a domestic corporation, for use in carrying on its business, as authorized by an order of the bankruptcy court, is maintainable in the City Court of New York.

## Executive Department, HARRISBURG.

### MUNICIPAL BONDS.

*School Law—Words and phrases—Municipal corporations—School district—Deposit of state moneys—Act of 1906.*

The bonds of school districts are not municipal bonds within the meaning of Section 7 of the act of 1906, P. L. 47, so as to authorize them to be deposited with the State Treasurer as security for the deposit of state moneys.

The word "municipal," as used in Section 7 of the act of 1906, has no qualifying words of any kind attached to it, and, therefore, must be construed as referring to the bonds of a municipal corporation with the fullest and broadest powers of a municipality and not to a subdivision with such limited powers as a school district, which is not strictly a municipal corporation.

Request of board of revenue commissioners for opinion.

Todd, Attorney-General, October 30, 1907. —I beg to acknowledge receipt of your letter of October 9, 1907, setting forth a copy of a resolution of the board of revenue commissioners as follows:

"That the clerk of the board be instructed to write the attorney-general for an official opinion as to whether school bonds are municipal bonds within the meaning and purview of Sec. 7 of the act approved February 17, 1906, P. L. 47, and can be approved by the board of revenue commissioners and the banking commissioner as proper securities to secure deposits of state funds."

Section 7 of the act of February 17, 1906, is as follows:

"That in lieu of the surety bonds of surety companies, or of individuals, as aforesaid, the deposit of state moneys may be secured by the deposit with the state treasurer of United States, municipal, or county bonds, to be approved by the revenue commissioners and the banking commissioner, or a majority of them, in an amount, measured by their actual market value, equal to the amount of deposit so secured, and twenty per centum besides. Said bonds to be accompanied by proper assignments or power of attorney to transfer the same, and said trust deposit of securities to be maintained, on request, at

the amount aforesaid, in case of any depreciation in the value thereof."

School districts are not strictly municipal corporations. They have neither a common seal nor legislative powers. *Wharton v. School Directors*, 42 Pa. 358; *Com. v. Beamish*, 81 Pa. 389; *Colvin v. Beaver*, 94 Pa. 388; *Erie School District v. Fuess*, 98 Pa. 600. The word "municipal," as used in Sec. 7 of the act of 1906, has no qualifying words of any kind attached to it, and, therefore, must be construed as referring to the bonds of a municipal corporation with the fullest and broadest powers of a municipality, and not to a subdivision with such limited powers as a school district.

I am, therefore, of opinion that the bonds of school districts are not municipal bonds within the meaning and purview of the act of assembly in question, so as to authorize them to be deposited with the state treasurer for the deposit of state moneys.

(From *Paul A. Kunkel, Esq., Harrisburg, Pa.*)

### Evidence—Carbon Copies.

The Supreme Court of Minnesota, in *International Harvester Company of America vs. Elfstrom* (112 N. W., 252), has held that carbon copies are duplicate originals, and either the first or the carbon copy may be introduced in evidence without accounting for the non-production of the other. It was said:

"The remaining question relates to the reception in evidence of what the appellant claims was a mere copy of the contract without having first accounted for the absence of the original. This presents an interesting and somewhat novel question, but which, by reason of the introduction of labor-saving devices in modern offices, is liable to arise more frequently in the future. A sheet of carbon paper was placed between two sheets of order paper so that the writing of the order upon the outside sheet produced a facsimile upon the one underneath. The signature of the party was thus reproduced by the same stroke of the pen which made the surface, or exposed, impression. In *State vs. Teasdale* (97 S. W., 996, 120 Mo. App., 692) it was held that a carbon copy of a letter was not admissible in evidence until the

original letter from which it was made was accounted for. The signature would not, under ordinary circumstances, appear upon the carbon copy of such a letter. In *Chesapeake, etc., Ry. vs. Stock* (51 S. E. 161, 104 Va., 97) it was held that a carbon copy made at the same time and by the same impression of type may be regarded as a duplicate original of the letter itself and admitted in evidence without notice to produce the letter. We think this view can be sustained and that a clear distinction exists between letter press copies of writings and duplicate writings produced as was the contract in the case at bar. It is well settled that where a writing is executed in duplicate or multiply, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act the other (*Crossman vs. Crossman*, 95 N. Y., 148; *Hubbard vs. Russell*, 24 Barb., N. Y., 408; *Lewis vs. Payne*, 8 Cow., N. Y., 71, 18 A. M. Dec., 427; *Jackson vs. Dennison*, 4 Wend., N. Y., 558; *Barr vs. Armstrong*, 56 Mo., 586; *Weaver vs. Shipley*, 127 Ind., 526, 527, N. E. 146; *Cleveland, etc., Ry. vs. Perkins*, 17 Mich., 296; *Phillipson vs. Chase*, 2 Camp., 110). It is very generally held that a reproduction of a writing by a letter press cannot be considered as a duplicate (*Wigmore, Evidence*, Sec. 1234, and cases there cited; *Menasha Ware Co. vs. Harmon*, 107 N. W., 299, 128 Wis., 177). The distinction between letter press copies and instruments produced by the use of carbon paper, as in this instance, seems reasonably clear and satisfactory. What makes two numbers of an instrument duplicates and equivalents is the fact that the legal act of the parties as consummated embraces them both. Letter press copies are produced by an act distinct from and subsequent to the consummation of the legal act of execution. It may or may not be the act of the parties to the contract. We know from common experience that such copies are ordinarily produced by the labor of clerks and other employees, and that the results are not always satisfactory. But all the numbers of a writing which result from the completion of the legal act of the parties, although aided by mechanical devices or chemical agencies, meet the requirement of

originals. If the reproduction is complete, there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures. The argument that the recognition of these instruments as duplicates would encourage fraudulent practices does not touch the principle involved."—The American Lawyer.

Where, prior to the four months period, a bankrupt recovers a judgment for a sum of money, it has been held, in *Kneeland v. Pennell*, 18 Am. B. R. 538, that the title of his trustee to the judgment is subject to the lien of the attorney for the bankrupt in the action; and in the absence of any restraining order, the court in which the judgment was recovered may proceed to enforce the lien.

Where the answer of an alleged bankrupt admits his insolvency, and that he had committed the acts of bankruptcy charged, but alleges that he is not amenable to the bankruptcy law because chiefly engaged in farming, it has been held, in *Stephens v. Merchants' National Bank*, 18 Am. B. R. 561, that he is not entitled to a jury trial under section 19a of the Bankruptcy Act.

In the case of *Hurley v. Devlin*, 18 Am. B. R. 627, it has been held that upon the death of a bankrupt the court in which the order of adjudication was entered has exclusive jurisdiction to determine his widow's right of dower out of all the lands of which the husband died seized, including those located in a State other than the State of the bankrupt's residence.

The United States Circuit Court of Appeals, Fifth Circuit, has held, in *Hull v. Burr*, 18 Am. B. R. 541, that a trustee in bankruptcy is vested by the Bankruptcy Act, 1898, with all the rights and title of the bankrupt, as well as with the rights of his creditors, and when he seeks to enforce rights or recover property in a district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whos

rights he has acquired and can only resort to the same courts, State or Federal, and is confined to the same remedies, subject to the exceptions made by the amendment of 1903 to sections 53b and 70e of the Bankruptcy Act.

The truth of articles published during a trial, tending to prejudice the public and members of the jury, and thereby influence the result, is held, in *Hughes vs. Territory* (Ariz.) 6 L.R.A. (N.S.) 572, to be no defense to a proceeding for contempt.

That an agreement for an exclusive agency for a certain class of goods is illegal under a statute prohibiting contracts in restraint of trade is held, in *Packard vs. Byrd* (S.C.) 6 L.R.A. (N.S.) 547, not to prevent a recovery for a bill of goods sold under it.

A contractor who fails to secure the architect's certificate of completion, as required by his contract, is held, in *Bush vs. Jones* (C.C.A. 3d C.) 6 L.R.A. (N.S.) 774, to be obliged, in order to recover by showing a substantial completion of the building, satisfactorily to establish that the certificate was unreasonably withheld.

A contract between the proprietors of the only two first-class hotels in the place to close one for a money consideration to be paid by the proprietor of the other, in order to give the latter a monopoly of the business, is held, in *Clemmons vs. Meadows* (Ky.) 6 L.R.A. (N.S.) 847, to be contrary to public policy and void.

Acceptance, without reading it, of a fire insurance policy issued upon parol application without any representation as to title, which contains a provision that, except in case of an agreement indorsed on or added to the policy, it shall be void if the subject of insurance be a building on ground not owned by the insured, is held, in *Wyan-dotte Brewing Co. vs. Hartford F. Ins. Co.* (Mich.) 6 L.R.A. (N.S.) 852, to be binding upon the applicant, and to bar recovery by him for loss, if the building is on leased property, which fact was not known to the insurer or its agent.

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PITTSBURGH, PA., DECEMBER 25, 1907.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

HEUER v. MORRIS.

*Cancellation of agreement—On account of being intoxicated—Later ratification.*

On bill filed to cancel an exchange of real estate on the ground that the plaintiff was drunk at the time he entered into the agreement, the testimony showed that plaintiff was slightly intoxicated when he signed the agreement, but had a good understanding of what he was doing, and he later closed the transaction and did other acts confirming it. Held, the bill should be dismissed.

No. 628 April Term, 1907.

Opinion by FRAZER, P. J. Filed November 12, 1907.

The purpose of this bill was to compel defendant to reconvey to plaintiff a lot of ground situate on Perrysville avenue in the Fifteenth ward of the city of Allegheny. From the bill, answers and proofs we find the following facts:

### FINDINGS OF FACT.

1. Plaintiff, who is 28 years old and a typesetter by trade, was about the first of June, 1906, the owner of a lot of ground situate in the Fifteenth ward of the city of Allegheny on Perrysville avenue, upon which lot was erected a three-story frame dwelling house numbered 3929, the property being fully described in paragraph 10 of plaintiff's bill.

2. Defendant is a real estate agent, having his office on Federal street in the city of Allegheny. About June 1, 1906, plaintiff visited the office of defendant, and placed in his hands for sale the property referred to in the preceding paragraph, at the time constituting defendant his agent to sell the same for the price or sum of \$5,000, defendant to receive for his services a commission

of two per cent. in case of a sale of the property being made by him.

3. On the afternoon of September 20, 1906, plaintiff called at the office of defendant and, learning that no purchaser had been procured for the property, proposed to sell the same to defendant for the price or sum of \$5,000, \$1,000 of the purchase price to be paid April 1, 1907, \$500 on October 1, 1907, and defendant to assume a mortgage against the property upon which there remained unpaid \$2,860; plaintiff also to take as part of the consideration money a lot of ground owned by the defendant situated in Bethel township, Allegheny county, which lot was valued at \$1,100, less a mortgage of \$300, which plaintiff agreed to assume, this agreement being reduced to writing and signed by the parties, a copy thereof being made by plaintiff at the time.

4. Within a day or two after the execution of the agreement above referred to plaintiff called at the office of defendant and left with defendant's father-in-law, who was an employee of defendant, his deed for the Perrysville avenue property, stating that he desired to have the matter fixed up as soon as it conveniently could be. After examination of plaintiff's title to the property by defendant's attorney the sale was closed October 3 by plaintiff executing and delivering to defendant a deed for the Perrysville avenue lot, and defendant executing and delivering to plaintiff a deed for the Bethel township lot, and also notes for the balance of the purchase money as follows: Note for \$1,000, payable April 1, 1907, and also note for \$352, payable October 1, 1907. These notes were signed by defendant, witnessed by Mr. Rolshouse, and bore interest at the legal rate. Subsequently, at the request of plaintiff, other notes for the same amounts and payable at the same time were given by plaintiff to defendant in exchange for the notes first executed. These latter notes were identical with the first, except that defendant's signature was not witnessed by any person.

5. After the exchange of deeds defendant took possession of the Perrysville avenue property and made improvements thereon to the extent of between five and six hundred dollars, plaintiff and his parents re-

siding in the house at the time.

6. The Perrysville avenue property is not worth more than \$5,000, and the fair value of the Bethel township lot, unencumbered, would be about \$700 or \$750.

7. On February 15, 1907, plaintiff, with his attorney, called at the office of defendant and expressed dissatisfaction with the terms upon which his property was transferred to defendant, claiming that the consideration was inadequate and that he had been induced to make the transfer while under the influence of liquor. A demand was made upon defendant for a reconveyance of the property, which was refused.

8. It appeared from the testimony that plaintiff had not been in good health during the spring and summer of 1906, and between June and September of that year had visited Germany, returning home about September 10, 1906. On September 20, 1906, plaintiff met his brother in the city of Pittsburgh about noon, the two remaining together until about 3:30, when they separated, plaintiff going to the office of defendant and his brother to his home. During the time they were together they took five or six drinks of whisky—"not very large ones." The evidence shows no other drinking by plaintiff that day.

9. On April 1, 1907, defendant tendered to plaintiff \$1,030, being the amount, with interest, of the note for the part of the purchase money due that day, which amount was refused by plaintiff.

#### CONCLUSIONS OF LAW.

1. The evidence in this case does not sustain the averments in the bill. In the first place, while plaintiff might have been under the influence of liquor to some extent on the afternoon the agreement for the sale of the property was executed, it by no means appears that he did not know just what he was doing. At the time of signing the agreement he discussed the transfer and the terms upon which it was made with defendant in the presence of others, and after the agreement had been executed made a copy of it which bears no indication of having been written by an intoxicated person, but even if plaintiff was to some extent under the influence of liquor at that time his subsequent actions when perfectly sober

would amount to a ratification of the contract. The fact alone that he afterwards executed a deed for the property and permitted defendant to take possession of it and make repairs upon it and otherwise exercise ownership over it without objection for nearly five months, is sufficient to prevent us from making the decree asked for. In view of the foregoing conclusion and the further fact that plaintiff will receive about the full value for his property, this bill must be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *S. G. Nolin.*

For defendant, *J. L. Ritchey.*

(Common Pleas No. 2, Allegheny Co.)

### HAMNETT v. MONONGAHELA TRUST COMPANY.

*Trusts—Parol gift of real estate—Purchaser at sheriff's sale.*

A parol gift of real estate, accompanied by possession, gives the donee a title which he can enforce against a purchaser at sheriff's sale who has agreed to buy the property in the interest of the donee.

No. 514 April Term, 1907.

Opinion by YOUNG, J. Filed October 30, 1907.

This was a bill to have the defendant declared trustee for the plaintiff of certain lands described in the bill situate in Mifflin township, Allegheny county, Pa.

We find the following facts:

#### FINDINGS OF FACT.

1. Guy Hamnett, a son of the plaintiff, was the holder of the legal title to the real estate described in the bill prior to August 6, 1906, and that it was subject to a mortgage to Irwin Redpath of \$4,000, dated April 30, 1903, payable in three years with interest from date.

2. On January 24, 1906, at No. 674 February Term, 1906, of the Court of Common Pleas No. 3 of this county, the mortgagee caused a *scire facias* and *alias scire facias* to be issued on the mortgage above recited, and judgment was taken in default July 18, 1906, and the real estate described in the bill sold to Irwin Redpath by the sheriff on August 6, 1906.

3. Guy Hamnett, the mortgagor, had removed from the state of Pennsylvania in the spring of 1904 and never returned. Prior to August 6, 1906, the date of the sheriff's sale, Guy Hamnett made a parol gift of the lands described in the bill to his mother, Mary L. Hamnett, who took possession of the same, paid interest on the mortgage, paid taxes, fenced it, leased it, and otherwise treated and claimed it as her own property.

4. The plaintiff learned of the foreclosure proceedings on the mortgage, and desiring to secure for herself something out of the proceeds of sale of the real estate, consulted her attorney, J. Merrill Wright, who was at the same time solicitor for the Monongahela Trust Company, the defendant, as to the method to accomplish that purpose. Wright advised the plaintiff that the only manner in which the title of her son, Guy Hamnett, to the lands could be divested was by a sheriff's sale, and then Wright sought to obtain the aid of the defendant in assisting the plaintiff. The defendant agreed to purchase the lands in its own name, provided the sum of not more than \$5,000 was necessary, then to dispose of the real estate as quickly and as profitably as possible, and after being reimbursed the amount invested, together with 6 per cent. interest, expenses, attorney's fees, and a commission of 10 per cent. on the price at which it might thereafter sell the property, to voluntarily pay to the plaintiff such sum as might be left from the proceeds of such sale or sales, and to convey to the plaintiff whatever of the lands might be remaining. The agreement on the part of the defendant was not in writing, and it was especially stipulated and agreed to by plaintiff that the control and management of the real estate after its purchase by the defendant should be solely in the hands of defendant. Before the sheriff's sale Irwin Redpath, the mortgagee, was advised of the arrangement which had been made by the plaintiff with the defendant, and consented that defendant should purchase the property, and after the sale of the property to Irwin Redpath and delivery of the deed to him, he conveyed to defendant by deed dated August 26, 1906, and defendant paid him therefor the sum of \$4,975, being in full

of balance due on his mortgage together with interest and costs, attorney's fees, etc., and no part of that consideration was paid by plaintiff.

5. On January 19, 1907, the defendant entered into a contract with James C. Kuhn for the sale of the five acre tract for the sum of \$8,500. The price of \$8,500 was the fair market price of the five acre tract on January 19, 1907, and it has not increased in value to the present.

6. About January 19, 1907, the plaintiff notified J. Merrill Wright and the Monongahela Trust Company that she was prepared to pay it the sum of money it had invested, with interest, expenses, and 10 per cent. on the amount of money it had invested.

7. After the sale of the five acre tract, described as the seventh piece in the first paragraph of the bill, three still remained in the defendant, the Monongahela Trust Company, twenty-seven lots of ground described as the 1st, 2nd, 3rd, 4th, 5th and 6th pieces in the first paragraph of the bill.

We conclude as matter of law:

#### CONCLUSIONS OF LAW.

1. The Monongahela Trust Company, the defendant, took the lands described in the writ in trust for the said plaintiff to sell such portion of the lands as might be necessary to reimburse it the amount invested, together with 6 per cent. interest, expenses, attorney's fees and a commission of 10 per cent. on the price at which it might thereafter sell such portion of the lands as might be sold, and to reconvey to the plaintiff whatever of the lands might remain unsold.

2. The Monongahela Trust Company, the defendant, may complete the sale of the five acre tract to James C. Kuhn for the sum of \$8,500, and out of the proceeds thereof reimburse itself the amount invested by it, together with 6 per cent. interest, expenses, reasonable attorney's fees and a commission of 10 per cent. on the sum of \$8,500.

3. The defendant shall account for and pay over to the plaintiff the balance of the sum of \$8,500 after deducting the amount necessary to reimburse the plaintiff, as set forth in the foregoing conclusion of law.

4. The Monongahela Trust Company, the defendant, shall convey to the plaintiff



all the remaining lands described in the bill, being those described in the 1st, 2nd, 3rd, 4th, 5th and 6th pieces in the first paragraph of the bill.

5. That the costs of this proceeding be paid by the defendant.

#### DISCUSSION.

The evidence satisfies us that Guy Hamnett made a parol gift of the lands in dispute to his mother, and that she entered into possession of the same. Both the Monongahela Trust Company and its attorney, Mr. Wright, who was also attorney for the plaintiff, were willing to assist the mother to save something out of the lands, and a verbal agreement was made between the company and Mrs. Hamnett under the advice of their mutual attorney. We find that that agreement was that the Trust Company should manage the real estate, sell as quickly as possible a portion of it, reimburse itself out of the proceeds of the portion sold, including the money actually expended by it, the expenses of its management, 6 per cent. on the money invested to secure the title, reasonable attorney's fees, and 10 per cent. on the amount received upon the sale of the portion sold. The defendant in its answer asserts that this was the agreement and the president of the company admits it when on the stand, and says it is still the purpose of the defendant to carry it out. There is undoubted authority that a parol gift such as this, and entry into possession by the donee, gives such donee such an interest as would enable him to sustain a bill against a purchaser at sheriff's sale, who had promised to purchase for the benefit of the donee and then refused to perform the promise as trustee *ex-maleficio*. In this case, the defendant having alleged a trust and having afterwards, through its officers, admitted when the case was on trial that it had purchased the land for the benefit of the plaintiff and was still willing to carry out the terms of its agreement, it is not necessary to find either fraud or to resort to a finding that the defendant is a trustee *ex-maleficio*. We are only required to declare the trust as set up and proven by the defendant. If the defendant had offered before bill filed to perform the agreement which it now admits it might have saved the costs. As it is, we

are of the opinion that the costs should be paid by the defendant.

For plaintiff, *G. C. Hartman*.

For defendant, *J. Merrill Wright* and *W. L. McConegly*.

### Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of *J. M. SCHAFER*,  
Deceased.

*Decedent's estate—Burial expenses—Limitation by will—Expenditure by executor—Surcharge.*

An executor may be justified in exceeding a testamentary limit in the amount to be expended for funeral and tombstone by the conduct of the family and on the ground of testator's mistake.

No. 102 May Term, 1907.

HAWKINS, P. J.

#### STATEMENT.

The question involved in this case is whether or not the executor was justified in exceeding the amount fixed in the will for funeral expenses and a tombstone.

The facts are these:

Testator directed that his "funeral, burial and tombstone expenses" should not exceed \$250. Before this limit was known to the family funeral and burial expenses amounting to \$276 had been incurred, and afterward the executor contracted for a tombstone \$200 additional. It was conceded that the amount so expended was reasonable when considered in relation to the value of the estate, but objection was made by one of decedent's daughters to allowance of the claim presented for the cost of the tombstone as being in excess of the amount fixed in the will. Exceptant's share of this excess would be one-fifth.

OPINION. Filed December 11, 1907.

Looking at the face of this will it is seen that testator contemplated the erection of a tombstone; and the duty of the executor to effectuate this purpose was implied. It does not necessarily follow because the limit of expenditure was exceeded in testator's funeral that his wishes in respect of a tombstone must fail. The liberality of legatees is not compliance with testator's expressed wish in

respect of the erection of a tombstone; the executors duty remained. In the absence of notice to the contrary it was an implied encouragement to the executor to disregard the testamentary limit. The estate was theirs to do with as they pleased. The Courts are not disposed to a strict interpretation of such provisions. In *Porter's Estate*, 77 Pa. 43, it was said that mistakes in fixing the amount to be expended in such matters were not uncommon, and double the maximum amount named in the will there was accordingly allowed. The reasonableness of the increase in the present case having been conceded the exceptant has no just ground of objection to its allowance.

For accountant, *Mark Schmidt* and *Joseph McClure*.

For exceptant, *J. W. Lemon*.

## Court of Quarter Sessions,

CAMBRIA COUNTY.

### COMMONWEALTH v. CAUFFIEL.

#### *Libel—Corporations—Costs.*

Under the laws of Pennsylvania a criminal action does not lie for libelling a corporation.

On the trial of an indictment for libelling a corporation the Court instructed the jury to return a verdict of not guilty, but left to the jury the disposition of the costs.

December Sessions, 1907.

Oral charge to the jury by SAVAGE, J.  
Filed December 18, 1907.

Gentlemen of the jury:

Counsel have agreed that this case be submitted to you under the charge of the Court. They have made this agreement with the knowledge that I propose to leave to you only the question of costs.

I think it wise, under the circumstances of this case, that I should explain to you my reasons for refusing to leave the question of the defendant's guilt to you, or, in other words, for taking the case from the jury on that question.

It is perhaps unfortunate that I am required to do this, because if it were found by you, under the evidence in this case, that the defendant did maliciously undertake to injure the United States National Bank and

the Johnstown Trust Company, by circulating the notices offered in evidence, it would seem that he ought to be punished. I think that will be conceded by every fair-minded man.

The case presents features which make it of unusual interest to the public at large, and especially on account of the occurrence having taken place at the time when it did—a time when financial institutions all over the country were held, more or less, in distrust by the people.

Under our financial system, the surplus earnings of the great mass of the people of the land are as a rule deposited in national banks and trust companies, and their financial condition and their welfare is the welfare of the people of the country; and in my judgment, and I believe in the judgment of every one within my hearing, there ought to be adequate legislation to protect these institutions, which are, as it were, the institutions of the people, because they are the institutions which are taking care of the money of the people, and adequate legislation to protect them against any course of conduct on the part of any individual which would have a tendency to create financial disaster, should be enacted. The situation may well be conceived of where a particular financial institution or a particular bank may be in an unsound condition, or may be so managed as to make it unsafe as a depository, and if reports are true, there are plenty of those kind of institutions over in the center of the financial storm district, New York. But there ought to be a law that would protect the people against the exposition of even an institution of that kind at a time when such exposition would have a tendency to do great harm by causing timid people to withdraw their holdings from other financial institutions and thus create a stringency on money banks, and financial and business disasters; not for the protection of the particular bank which might have been at fault, but for the protection of the peoples' banks in general. Some of you may never have thought of the situation of a bank, and if you would have been told that a bank could not pay all its depositors, you would have thought that that bank was not in a sound financial condition.

That is not correct. No bank is ever able to meet the demands of all its depositors if they were to require their deposits to be repaid to them at any one time. Any bank that would keep itself in such condition would be very badly mismanaged and would soon fail, because the purpose of banks is to act as an intermediary in the loaning of the money of a man who has it to loan to the party to desires to borrow it, usually for business purposes. Money is deposited by you, by the wage earner, by the merchant, by the capitalist, by whoever has money to deposit, and the banks loan it out to those who wish to borrow, on proper security, and in that way they make their money, and in that way they reap their profit. In many instances they pay interest on deposits, small interest. They are obliged to reloan this at a larger interest, and they are obliged to make their money in that way, so that any action on the part of any individual, especially at a time when there is distrust of our financial institutions by reason of some of them having failed throughout the country, which would cause, or have a tendency to cause, a run on our banks, ought to be the subject of punishment for the good of the general public, and there ought to be, and I have no doubt there will be, legislation which will cover this situation, providing for a situation such as this; and, in my judgment, it ought not to be an extension of the libel law generally to corporations, which might be well enough as to other and different kinds of corporations than banks, but there ought to be a law especially protecting such institutions I am speaking of, financial institutions, banks; because the injury is so far reaching and affects not the individual corporation alone, but is likely to reach out and affect communities and the general public at large, and if there is legislation, as there will be, unless the next legislature is remiss in its duties to the general public, I hope it will be something on the lines I have indicated; that is to say, not the extension of the libel law to cover banking institutions, but special legislation, or legislation that will specially protect institutions of this kind.

The law, as it is to-day in Pennsylvania, does not contemplate that a corporation may

be libeled, in my judgment. When the motion to quash the indictment was made yesterday I had considerable doubt on this question. I have examined the opinion of Judge Hasler, of Lancaster county, which is the only opinion that is at all satisfactory in this State, as well as the Act of Assembly, and the comments on the common law by the writers of treatises on criminal law, and I am of the opinion that a corporation in Pennsylvania may not or cannot be libeled under existing laws. The Act of Assembly of 1860, which is said to be nothing more or less than a definition of the criminal libel, provides: "If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule, such person shall be guilty of a misdemeanor," etc. I do not think the legislature had in contemplation any other than a natural person, and I do not think, especially in view of the time in which this act was passed, that the legislative body for a moment considered that they were protecting by this corporations. That they ought to enlarge the scope of the libel law to include corporations in general, I have no question; but there should be something special for the protection of our financial institutions on account of the close relations they bear to the people, and especially because the money of the great depositing public is tied up in them.

Now, to come down to this particular case, I think the notice, the article complained of, would bear the construction put upon it by the innuendo of the indictment, and if corporations could be libeled, I would have to leave it to you to say whether or not the meaning was that which the prosecution has attributed to that notice. And you then would have to take into consideration the circumstances surrounding this case, and the reason why these notices were sent out, and it is not improper that I should give you my ideas about this case. You are not to be governed by them when you come to pass upon the question of costs, because I am going to leave that entirely to you. But, assuming that it were found by the jury that

the meaning intended to be conveyed by that notice was that these institutions were in a shaky condition, it seems to me that there was no occasion for sending out these notices; the defendant did not need to do it in order to protect himself in any way. He could have recalled the checks without referring to the bank, and he could have changed his deposit—there was nothing wrong in that—the man has a right at any time to change his deposit; he has a right to quit dealing with a bank at any time he chooses the same as any other individual, and he could have made arrangements with the bank that the checks should be presented at the new depository. There is more than one way in which the matter might have been arranged other than by sending out notices of this kind.

There is considerable evidence in this case that would go to show it was the result of a quarrel or fight, because of some difficulties as to the electric light situation in the borough of Franklin. To visit the sins of two or three bank directors, even if they were in the wrong, not only upon the other bank directors and stockholders of the bank, or to attempt to do it, and what is far worse, to visit those sins upon other banks, not only in Johnstown, but elsewhere in the State of Pennsylvania, and all over the country, because the failure of one bank was just so much more fuel added to the fire, and just so much increased the distrust of the people, and cause them to withdraw their moneys, which, under ordinary circumstances, they would not have done—to visit the sins, even if they were in the wrong, of two or three bank directors upon whole communities is not a right thing. You will agree with me—everybody will agree with me—that this thing did draw out of a difficulty of that kind, according to the testimony we have before us. There are other ways of having wrongs righted, if this defendant was wronged by that electric light transaction, or deal—whatever it was—there are other ways of having his wrongs righted than by an action such as he took. He may not have realized what he was doing; he may not have stopped to think and consider what might have been the result of this course of action, and he may have acted in a sense innocently

in the matter, but still, in my judgment, it was a very wrong thing to do and a very unnecessary thing to do; and not for the sake of punishing the defendant, but for the sake of an example, if the law extended the crime of libel so as to protect a corporation, and the facts were found in this case as the commonwealth say they should be found under the testimony, it would be just and proper to punish him with such punishment as would bring about proper results. In other words, as the testimony stands, in this case, I do not think he ought to have taken this course of action—it was wrong. You, of course, have a right to pass upon the facts, and you will think for yourselves. I do not know what you might think about it. This is something I would not say to you; I would not even intimate to you how I felt at all; I would not expect you would know what my feelings were, if I were leaving the case to you and you were to decide it. I would not think of intimating anything. I am only expressing myself in this way because I think it is proper that the people should understand what the feeling of the Court is with regard to this matter, and understand the reasons for my feelings, and they should take some notice of what the duties of parties toward financial institutions in times of financial distress are—duties to these financial institutions, not because they are financial institutions, but because they are the great depositories of the people, and the safety of the people depend upon their safety, and the welfare of the people, so far as their moneys are concerned, is the welfare of the banks in which those moneys are deposited.

I have said as much as I have because I expect there are people here who may have more or less voice or influence in the selection not only of members to the next legislature, but in helping to obtain needed legislation in this direction. I think not only myself, but counsel for the defense, will agree—everybody will agree—that some legislation of this kind is needed, whether they think this is a crime, or whether they put upon it the construction that I put on this testimony or not, but they will agree to that general proposition, and I hope this case will lead to an effort on behalf of the people who

are interested in the matter to have the necessary legislation.

Now, I am going to leave with you the question of costs. You will return the defendant not guilty. If you think the costs ought to be visited upon him, you will visit him with the costs. If you think his conduct was such as would make it reasonable that he ought to pay the costs in this case, then you have a right to say so by your verdict. If you think the prosecutors, on the other hand, were too hasty in bringing their prosecution, that their course of conduct was not commendable but reprehensible in any degree, and that they ought to be visited with the costs, then you put the costs on them, or either of them. If you think both parties are at fault, you have a right to divide the costs; or if you believe that in the interest of justice neither party should pay the costs, then it would be right for you to place the costs on the county.

You may take this case and determine this question of costs, and return a verdict of not guilty. I might add the only reason why I have been free with my comments in this case is because of the general interest of the community; I am not interested either on one side or the other; I have in mind only the general interest of the community in this case.

Verdict not guilty and the defendant pay the costs.

For plaintiffs, *H. S. Endsley, Percy Allen Rose, D. P. Weimer and J. W. Leech.*

For defendant, *Robert S. Murphy, John Marron, F. P. Martin and D. L. Parsons.*

Charter authority in the corporation to perform the act is held, in *Stacy v. Glen Ellyn Hotel & S. Co. (Ill.) 8 L.R.A. (N.S.) 966*, to be necessary to render valid any attempted dedication by the directors of a corporation of its property for public use.

One attempting to ride a bicycle upon a sidewalk, even in the absence of an ordinance prohibiting it, is held, in *Fielder v. Tipton (Ala.) 8 L.R.A. (N.S.) 1268*, to take the risk of injury which he may thereby cause to pedestrian with whom he comes in contact.

Communitistic life by the members of a religious corporation is held, in *State v. Amana Society (Iowa) 8 L.R.A. (N.S.) 909*, not to be contrary to public policy.

The power of a receiver of a corporation to sue in a foreign jurisdiction, even with leave of the court, is denied in *Fowley v. Osgood (C. C. A. 8th C.) 4 L.R.A. (N.S.) 824*.

The right of a corporation to recover for a libel upon it, as distinct from that upon its individual members, is sustained in *Pennsylvania Iron Works v. Henry Voght Machine Co. (Ky.) 8 L.R.A. (N.S.) 1023*.

The right of a widow to recover her dower in lands alienated by her husband during his lifetime, out of his estate, either at common law or under a statute passed after the alienation of the property, making her dower interest one-third absolutely in value of the real estate possessed by him during coverture, is denied in *Hilton v. Steward (Utah) 8 L.R.A. (N.S.) 1101*.

A husband, who has been decreed to pay an allowance at stated times for his wife's support, cannot escape imprisonment for failing to comply with the decree by taking the poor debtor's oath according to the decision of the Rhode Island Supreme Court, in *Mowry v. Bliss, 65 Atlantic Reporter, 616*. The court holds that where a defendant in a divorce proceeding is incarcerated for failure to satisfy an execution for alimony and suit money he is not simply imprisoned for debt, but also for contempt for failing to comply with the court's decree.

In *McCullough v. Grady, 102 New York Supplement, 633*, decided by the New York Supreme Court, the majority of the court held that a claim for wine, food, cigars, liquors, etc., used in the celebration of a wake was a proper charge against decedent's estate. The majority depended on the case of *McCue v. Garvey, 14 Hun. 565*, in which it was considered the rule had been recognized, but the dissenting opinion insisted that the cited case was not in point, and repudiated the claim as illegal.

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No. 25.

PITTSBURGH, PA., JANUARY 1, 1908.

## Orphans' Court,

ALLEGHENY COUNTY.

[For former opinions in this estate see No. 20, page 123 and No. 22, page 136, N. S. Vol. 36.]

### In re Estate of MARTHA McD. SMITH, Deceased.

*Sale of real estate—Commissions—Authority of Agent.*

Where in the sale of land the decedent's estate has been benefitted by services of a real estate agent at the instance of an attorney of an heir the agent is entitled to reasonable compensation for his services.

No. 329 September Term, 1905.

OVER, J.

OPINION. Filed December 22, 1905.

It is contended by counsel for L. H. Smith, one of the exceptants, that J. H. Goehring acted as agent for the Kaufmann Bros. in the negotiations for the sale to them, and therefore is not entitled to any compensation out of the trust estate. If this matter is to be determined by his answer to one question without considering his whole testimony, and that of other witnesses called to support his claim, this objection seems well founded. That question was, "Who represented Kaufmann Bros.?" and the answer "I did." He also testified that he represented the heirs through Mr. Jennings; that there was no arrangements that Kaufmann's should pay his commissions nor compensate him. Morris Kaufmann testified that Goehring did not act as their agent, and nothing was ever mentioned about paying him; that Mr. Goehring called his attention to the property, and that before he saw Mr. Brown, his attorney, he told Goehring if it could be had for \$1,010,000 "we would be perfectly willing to take it." Mr. Brown, who represented Kaufmann Bros. as attorney in the

transaction, and who had frequent interviews with Goehring, testified that he was acting as agent attempting to sell to Mr. Kaufmann, and that he got the Kaufmann stipulation through him acting as attorney for them. Mr. Jennings testified that "he (Goehring) came to me; that is really what suggested to me to try and make a sale, as I had not thought of it any more." \* \* \* "In January he offered me \$1,000,000 flat, he had come by degrees from \$900,000 to \$950,000, and finally came up to \$1,000,000. I thought it was then worth while to get authority to try and make the sale." \* \* \* "He asked what commissions I would allow; I told him The Real Estate Trust Company's commissions were \$15,000; that I presumed that the Court would allow that, but that was for the Court to say."

Mr. Goehring had prior to his negotiations through Mr. Jennings approached the representatives of the Oliver estate, stating that he had a possible purchaser at \$1,000,000 and wanted the estate to pay the whole or part of his commissions, which they declined to do.

It thus clearly appears that he expected to be paid by the Smith Estate, and considering all the evidence, that Mr. Goehring did not act as Kaufmann's agent in the transaction, and was mistaken when he said he represented them.

It is alleged also that he knew that Kaufmann's would give \$1,100,000 for the property, and that he acted in bad faith to the estate in not communicating this fact to the trustee. The evidence shows very clearly, however, that it was with the greatest difficulty the stipulation was procured from them to bid \$1,040,000, and that Mr. Goehring had no information they would bid any more until the public sale, at which he bid for them \$1,100,000. At this time he did not represent the trust estate; had a perfect right to act for Kaufmann's, and what he did was not prejudicial to the estate.

Kaufmann's, like all purchasers, wished to procure the property at the lowest possible price, and the fact that they increased their offers submitted by Goehring to Jennings does not militate against his claim. It is very probable that if he had not opened negotiations with Mr. Jennings for the sale

of the property that it would have been sold for \$100,000 less than was realized at the public sale, and as the estate has been greatly benefited by his services he should be compensated.

Dissenting opinion by HAWKINS, P. J.  
Filed December 22, 1905.

I must dissent from the dismissal of the exceptions to the allowance of Mr. Goehring's claim upon the grounds:

(1) That he was not employed by the trustee for sale; and

(2) That by his own admission he was acting in the interest of Kaufmann Bros.

It would be obviously bad policy to permit any real estate agent who secured, or claimed to have secured, a bidder in the course of proceedings for sale under order of this Court to make that a basis for compensation. The whole guild would be rushing into court clamoring for commissions and the interest of heirs become a secondary consideration. The present case is a striking illustration of the evils of such a practice; commissions amounting in the aggregate to over 30 per cent. of the advanced price realized at the public sale were claimed and much valuable time occupied in passing on them, whereas only  $1\frac{1}{2}$  per cent. was claimed by the agent who had previously made private sale under authority from the trustee. The appointment of a trustee for sale implies his right to take such measures as may be proper to carry the order of the Court into effect, and therefore to employ necessary agents. There is no pretence that Mr. Goehring had any authority whatever from the trustee in this case to act or that the trustee even knew he was taking any part in the sale. It may be conceded that if, acting solely in the interest of the estate, although a volunteer, he had been instrumental in raising the price by \$100,000, he would have had a strong equity to recognition by this Court; it is upon this ground only that the claim of Mr. Jennings can be sustained, but Mr. Goehring admittedly had no contract relation with the estate, and his own testimony shows him assuming the impossible function of serving two masters, and therefore without any equity to compensation. This is seen in his admission that he "repre-

sented" Kaufmann Bros.; made an "offer" of \$1,010,000 in their "behalf;" knew they would go higher and yet did not inform the trustee of this fact, and a higher offer was made "for us" (meaning the Kaufmann's) by John D. Brown, who was their attorney, and his continued agency for them in bidding for the property when offered at public sale. It is said that he had great difficulty in getting the Kaufmanns to bid \$40,000 more, but this is discredited by his own admission and by the fact that within a few weeks thereafter he bid, under their direction, nearly \$100,000. So it is urged that resale would not have been ordered without his services in securing the Kaufmann's bid, and the number of bidders at the public sale showed that the property was in demand at a price in excess of \$1,000,000. But concede the truth of this suggestion, the result would have been the same had he made the bid as the avowed agent of the Kaufmanns. Every bidder at the public sale raised the price and thereby benefited the estate, and yet no one would claim that these bidders are entitled to compensation. An essential condition of recovery is that an agent shall make full disclosure of all the material facts to his principal, and Goehring kept the council of the Kaufmanns.

But while it is conceded that the testimony of Mr. Goehring himself is unsatisfactory, it is insisted that his claim is sustained by that of others, and particularly Mr. Jennings and Mr. Kaufmann, but an examination of that testimony only fails to strengthen his case. According to the testimony (quoted) of Mr. Jennings, who disclaimed any authority to speak for the Court, Mr. Goehring first "offered" him \$900,000 and "came up by degrees" to \$1,000,000; and it was then he thought it worth while to try and get authority to make a resale. There was no pretence of consultation with the trustee nor promise of compensation. According to the testimony of Maurice Kaufmann, who was an interested witness so far as compensation was concerned, Mr. Goehring first told the brothers that the Smith buildings could be bought for \$1,000,000 and afterwards that "probably" \$10,000 more would buy it; that their "dealings were altogether with Mr. Goehring and Mr. Brown,

who was their attorney, at least I left everything to Mr. Brown;" and that Mr. Brown after returning from court reported they would have to "make a better offer," which was done. This testimony leaves the impression that Mr. Goehring was not there on behalf of the estate to get the highest price, but in consultation with the Kaufmanns to ascertain what bid would be sufficient to get them the property; he was not a privateer cruising on the sea of trade to make reprisal for the benefit of the estate, but issued from a foreign port to get what he could and give what he must, and has therefore no equity to recognition here.

I would therefore strike out the allowance made to him by the Auditing Judge both on the ground of public policy and want of equity.

### Court of Quarter Sessions,

ALLEGHENY COUNTY.

#### In re Road in Scott and Union Townships and Green Tree Borough.

*Township roads — Opening of — Proceedings under the act of 1836 — Motion to quash — Act of June 7, 1907.*

A road between two townships of the first class may be laid out in the manner provided by the act of 1836. That act in such a case is not repealed by the act of June 7, 1901, relating to the same subject.

No. 6 June Session, 1907.

Opinion by SHAFER, J. Filed December 7, 1907.

In this case the road petition in the usual form was presented, asking for the laying out of a public road from a point on the Banksville road, being a road macadamized by the county, to a point on the Pittsburgh and Washington pike, the distance between the points being apparently about three-fourths of a mile. Viewers were appointed, who reported in favor of a road which they laid out, the report being filed September 7, 1907. The road is substantially all in Union and Scott townships, a few feet about the middle of the road and a few feet at the end, being across a corner of Green Tree borough. The report was confirmed on October 25, and the present motion filed on

November 21, 1907. The motion is founded upon the fact that each of the townships above named is a township of the first class, and it is contended that the act of June 7, 1901, P. L. 510, has taken away the jurisdiction of the Court of Quarter Sessions to lay out such a road. That act gives the board of township commissioners power to lay out roads and streets within the township, and provides a system of ascertainment of damages and all other matters connected with the laying out of such roads or streets. It was held by the Superior Court in the case of the *West Liberty and Knoxville Roads*, 20 Superior Court, 586, that the act of 1836 does not, since the general borough law authorizing boroughs to lay out streets, authorize the laying out of a street wholly within two adjoining boroughs, it having been previously decided by the Supreme Court in *Parkersburg Borough Streets*, 124 Pa. 511, that the Quarter Sessions had no power to lay out streets wholly within a borough. It is urged in support of the motion to quash that, as the authorities of townships of the first class have substantially the same power to lay out streets as is vested in boroughs, the same rule should apply to roads in two or more adjoining townships. In the case of *Dempster v. Traction Company*, 205 Pa. 70, it was pointed out that the grant of like powers to a borough and to a township of the first class did not necessarily carry with it the same consequences; that although a borough and a township have the same powers in regard to streets, they still remain what they are, distinct species of municipality, the one being presumably a town or village, compactly built and occupying a comparatively small space, whereas a township, although sufficiently populated to be a township of the first class, might contain a number of towns or villages, and might also contain a large extent of territory which was purely rural and likely to remain so. It is also to be observed that the act of April 28, 1899, which creates townships of the first class, expressly provides that all existing laws relating to townships shall continue in force until changed as to either class of township by legislation relating expressly thereto. In a thickly populated county, such as the



county of Allegheny, it may well be that a great stretch of country may be wholly occupied by townships of the first class, and it would certainly be very inconvenient if public roads could not be laid out from points in one township to points in another without the joint action of the local authorities. And the argument *ab inconvenienti* made by the Supreme Court in the case of the *Somerset & Stoystown Road*, 74 Pa. 61, would seem to be equally applicable in the present case. In that case it was held that the act of 1836 was not repealed as to roads part of which lay in a township and part in a borough. It is suggested that the act of 1901 would seem to be exclusive as to the laying out of roads wholly within the township, and that if this is so the reasoning in the West Liberty and Knoxville case above cited should lead to the conclusion that it is equally exclusive in adjoining townships and boroughs. What the law may be as to the exclusive character of the act of 1901, as to streets wholly within the township, we are not now called upon to decide, but, considering the natural difference between a borough and a township, we are of opinion that the reasons which have induced the Courts to hold the act of 1836 repealed as to a road in two adjoining boroughs, are not sufficient to require us to hold that the act of 1836 is repealed as to a case like the present.

The motion to quash is therefore refused.  
For petitioners, *J. M. and M. W. Stoner*.  
For motion, *Alexander Gilfillan*.

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**Court of Common Pleas No. 2,**  
**ALLEGHENY COUNTY.**

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**GUARDIAN TRUST CO. v. GROVE.**

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*Trust companies—Act of May 9, 1899—Purchase of negotiable paper.*

The purchase outright by a trust company of negotiable paper does not constitute a banking business, and such a transaction is not in violation of the provisions of the act of May 9, 1899.

No. 784 July Term, 1907. Rule for judgment for want of sufficient affidavit of defense.

Opinion of FRAZER, P. J. Filed November 12, 1907.

The statement sets forth that on April 4, 1905, the Industrial Trust Company made and executed its promissory note in writing for the sum of \$2,500, payable on demand, which note was endorsed by defendant and others. The note was purchased by plaintiff before maturity for value, and upon demand for payment, the maker having failed to discharge the obligation, was protested, for non-payment of which the defendant as an endorser had due notice.

The affidavit of defendant sets up that defendant was an accommodation endorser, and that the proceeds realized from the sale of the note were credited to the account of the coal company, it being a depositor with plaintiff, and paid out upon its checks.

The sole defense is that plaintiff, a trust company, in purchasing the note, was doing a banking business, a business not authorized by its charter, and therefore its act was *ultra vires*, and it cannot recover in this action.

The defense, in our opinion, is not sound. The plaintiff was incorporated under the act of April 29, 1874, P. L. 73, as a title insurance company, and subsequently accepted the provisions of the act of May 9, 1889, P. L. 159, which statute extended plaintiff's power, *inter alia*, permitting it "to receive and hold on deposit and in trust and as security estate, real and personal, including the bonds, notes, obligations of states, individuals, companies and corporations, and the same to purchase, collect, adjust and settle, sell and dispose of in any manner without proceeding in law or equity, and for such price and on such terms as may be agreed between them and the parties contracting with them: Provided, that nothing herein contained shall authorize such corporation to engage in the business of banking." The act further authorizes it to "receive deposits of money and other personal property."

The provisions are sufficiently broad to authorize plaintiff to do just what it did in this case.

To sustain his contention, defendant relies upon the clause of the act of 1889, which provides that nothing contained in the act shall authorize the company to engage in the business of banking; and further, in

support of his contention, two clauses of the Constitution. as follows: (a) The clause relating to the creating of corporations to possess banking and discounting privileges (art. XVI, sec. 11); and (b) the clause which prohibits corporations from engaging in any business not authorized by its charter (art. XVI, sec. 6). It seems to us that in purchasing the coal company's note, endorsed by defendant, plaintiff could not be held to be doing a banking business within the meaning of either the Constitution or the act of 1889. While trust companies, in carrying on their business, must necessarily, to some extent, transact business that generally belongs to banks, when they do so, however, such separate transactions cannot be considered as doing a banking business.

In this case the note was not discounted as is usually the case in banking institutions, but was purchased outright, a purchase plaintiff was authorized to make by its charter; but even if the purchase by plaintiff of the note sued on should be considered as banking business, we are of opinion defendant cannot take advantage of that act and relieve himself from the responsibility of his endorsement. Defendant says he never received any benefit from his endorsement; perhaps not directly, but certainly indirectly, as an officer and stockholder of the company, but whether he did or did not, he contracted with plaintiff, and through his corporation received the benefits of the contract. He cannot, therefore, now relieve himself from liability on the ground of *ultra vires* on the part of plaintiff. In any light we look at this defense, we are of opinion it is not sufficient.

Rule absolute.

For plaintiff, *John F. Tim.*

For defendant, *Seymour, Patterson & Siebenek.*

## Court of Common Pleas, POTTER COUNTY.

### SUNDERLIN'S CASE.

*Public officers—County auditors' report—Striking off—Irregularities not apparent on the record.*

Inasmuch as the report of the county auditors

when filed, takes on the nature of a judgment of the common pleas court, on which execution may issue in like manner as upon judgment recovered in the usual course of law, there is no reason why an auditor's report, when filed in the court of common pleas, shall be stricken off or set aside in any case where a judgment obtained in the usual way would not be stricken off.

A county auditor's report will not be stricken off for want of jurisdiction or fatal irregularity which is not apparent on the face of the record.

The report of the county auditors set out that they entered on the performance of their duties "after proper notice to the several officers whose accounts we were required to audit." Held, that this, on its face, shows jurisdiction of the parties and that on a motion to strike off and set aside the report for the reason that no notice was given to the parties the court has no authority to go back of the report in order to investigate and inquire.

No. 214 June Term, 1906. Rule to strike off county auditors' report.

Opinion by GALBREATH, P. J., Fiftieth Judicial District, specially presiding. Filed December 28, 1906.

On April 6, 1906, the county auditors of Potter county filed their report in the common pleas court of said county for the year 1905. The report sets forth that the auditors met at the court house in said county on the first Monday of January, 1906, and "that upon the said first Monday of January, A. D. 1906, and after proper notice to the several officers, whose accounts we were required to audit, we did proceed to audit, settle and adjust the accounts of the commissioners, directors of the poor, treasurer, and sheriff of said county, and the following is a true and correct statement of their accounts the surcharges we have made, and the receipts and expenditures of said county for the year ending on the first Monday of January, A. D. 1906."

On May 17, 1906, D. A. Sunderlin presented his petition to said court, setting forth that he was a duly elected and acting county commissioner of the county of Potter for the year 1905; that certain surcharges had been made against him in said auditors' report, on account of payments made on certain contracts for county bridges, as well as on other accounts set forth in said petition; that no notice was served upon him by the said board of county auditors to appear before them and produce his books, papers and vouchers, from which the said audit and adjustment of the said accounts could

be made; that on one or two occasions, while the auditors were in session, he voluntarily appeared before them, and had some conversation with them respecting other matters, during which times no mention was made of any intended surcharges, nor was any opportunity given him to make any explanation relative thereto, and that he believes the surcharges were based on prejudice, and not on legal testimony taken by the auditors.

It is provided by act of assembly of April 15, 1834, P. L. 547, section 55, that "the report of the auditors shall be filed among the records of the court of common pleas, of the respective county, and from the time of being so filed shall have the effect of a judgment against the real estate of the officer who shall thereby appear to be indebted either to the commonwealth or to the county."

It is further provided in section 57 of the same act, that an appeal may be entered by the officer whose accounts have been settled to the court of common pleas within sixty days after the report has been filed.

The court is now asked "to strike from the record, and set aside the proceedings of the said board of county auditors, as to the petitioner's accounts set forth therein." Such is the prayer of the petition.

It is unnecessary to cite authorities in support of the general proposition that the report unappealed from, within the statutory period, becomes final and conclusive. Inasmuch, however, as the report, when filed, takes on the nature of a judgment of the common pleas court, on which execution may issue "in like manner as upon judgments recovered in usual course of law," as provided in section 58 of said act of assembly, it would seem to follow, reasonably, that such judgment may be set aside for reasons which would justify the setting aside of any other judgment of said court. A want of jurisdiction on part of the county auditors, either of the subject matter, or persons whose accounts they acted upon, if apparent on their report, would doubtless require that it be set aside as to such matters or persons as were not within their jurisdiction, as in the case of *Schuylkill Co. v. Minogue*, 160 Pa. 164.

Such power might also be exercised, we

think, in case of fatal irregularity appearing on the face of the record. Except in these instances the court is without authority to strike off a judgment.

"The court of common pleas has no power to strike off a judgment, except for want of jurisdiction or other fatal irregularity appearing on the face of the record." *Philadelphia, for use v. Jenkins et al.*, 162 Pa. 451.

"A judgment cannot be stricken off for irregularity, unless such irregularity appear upon the record." *France v. Ruddiman et al.*, 126 Pa. 257.

There is no apparent reason why an auditor's report, when filed in the common pleas court, should be stricken off or set aside in any case where a judgment obtained in the usual way would not be stricken off, that is, for want of jurisdiction or fatal irregularity apparent on the face of the record.

The report of the county auditors, now under consideration, does not on its face show a want of jurisdiction of either the subject-matter or of the parties. The subject-matter was within the sphere of their inquiry. The report sets out that they entered on the performance of their duties "after proper notice to the several officers whose accounts we were required to audit." This, on its face, shows jurisdiction of the parties. On a motion to strike off and set aside the report, we do not think the court has authority to go further back in order to investigate or inquire. It may be that the facts are altogether different from what the record shows. But if so, the petitioner was not without remedy. He had sixty days, after the report was filed in the common pleas and became a record of the court, open to the inspection of himself and all others, in which to appeal, and thus have all controverted questions adjudicated in that court. We do not understand that the common pleas has jurisdiction to enter upon such an inquiry except on appeal. It may, without an appeal, as we take it, set aside the report when filed, for want of jurisdiction, apparent from the report itself, as was the case in *Westmoreland Co. v. Fisher*, 172 Pa. 317, in which the county auditors had exceeded their authority, in attempting to reaudit the accounts of the county treasurer, after having already done so; or as in the case of

Schuylkill Co. v. Minogue, *supra*, in which, without jurisdiction, the auditors undertook to audit the accounts of an attorney employed by the county commissioners. The court might, no doubt, exercise similar authority, in the case of any other fatal defect apparent on the face of the proceedings. Except, however, for such purposes and for the additional purpose of execution under the statute, we are of opinion that the common pleas court cannot deal with the report of the county auditors except on appeal.

In the case of *Lacock v. White*, 19 Pa. 495, it is laid down as a rule "that a judgment rendered by one tribunal cannot be set aside and the cause heard again by another, though a superior one, except in the strict exercise of appellate jurisdiction. The court may, indeed, set aside an illegal award, strike off a lien irregularly entered or inquire if it was entered for a fraudulent purpose."

In the case of *Hutts v. Martin*, 131 Ind. 1, referred to with approval in *re Ziegler's Petition*, 207 Pa. 131, the court says: "We think it clear that an appellant court has the inherent power to relieve against accident and excusable mistake in the proper case . . . . All parties must be brought in within the time limited for appealing, unless accident, fraud, or excusable mistake is affirmatively shown."

These cases suggest that the court may, even after the time has gone by for appeal, grant relief in case of fraud, accident, or excusable mistake. But how is this to be done? To strike the judgment, or, as in this case, the report, from the record, without remedy to the opposing party, and without a hearing on the merits, might work a greater wrong than that sought to be remedied. For instance, in the present case, in which the petitioner, instead of pursuing the statutory remedy by appeal, asks the court to strike down the report so far as it affects him in the matters complained of, he thereby precludes the hearing which might be had on the merits by way of appeal, and thereby gains for himself, if his prayer be answered, whatever, if any, advantage there might be in avoiding such hearing on the merits of the matters in controversy, with corresponding prejudice to opposing interests.

Such possibilities suggest and emphasize the importance of pursuing strictly the statutory remedy. If, however, accident, fraud or excusable mistake, such as would work a

wrong, is made to appear to the court, relief may still be given, although the statutory time for appeal has gone by. Not, however, by striking off the report or setting it aside, but by granting an appeal *nunc pro tunc*. Such is the course indicated in *Ziegler's Petition*, *supra*. By pursuing this course real wrongs may be righted in the statutory way by appeal, and the rights of all parties ascertained and conserved.

In the present case the report of the auditors cannot be stricken off for the reason that no fatal defect is apparent of record, and the prayer of the petition must therefore be denied. Neither is there in the petition any allegation of fraud, accident, or excusable mistake on which to predicate an appeal *nunc pro tunc*.

True the petitioner sets forth that the auditors were prejudiced, as he believed, and intimates that this was the motive for the surcharge against him. But this averment is general in character, and is not made more definite by the proof.

Had the petitioner taken out his appeal at the time he filed his petition, which was within the statutory period of sixty days after the filing of the report of the auditors, all the matters he complains of could have been adjudicated with fairness to himself and all others.

As the case now stands, we think the rule to strike off and set aside the report of the auditors should be discharged, and the same is discharged at cost of the petitioner, this 28th day of December, 1906.

For petitioner, *W. K. Swelland*.

For respondent, *W. F. DuBois*.

[From Archibald F. Jones, Esq., Coudersport, Pa.]

### Excluding Public from Criminal Trial.

It is customary in some states, as, for instance, in New York, for a trial judge to exercise a great deal of discretion in the exclusion of people from the courtroom during criminal trials, when the character of the testimony, or some other reason, makes it seem fitting to him to do so. Thus, in *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433, where the court knew from a former trial that the testimony in the case would be particularly revolting and disgusting, he ordered all persons who had no business with the court, or connection with the case, to be excluded from the room, though

he permitted the defendant to have any friends whom he desired to sit with him. On appeal, the court said: "The county judge had in mind the necessity of a public trial. He was insistent in stating that any friends of the defendant would be admitted, or anyone that his counsel suggested. The reason for his order was again made plain,—that it was in consequence of the salacious details which were to be presented, and not with any view of hampering the defendant, or creating sentiment adversely to him. We think he possessed a discretion, and exercised it wisely." Cases in other states uphold a similar discretion of trial judges, where the indecency of the testimony is likely to draw people of morbid curiosity to the courtroom, and especially when the conduct of the audience in case of such testimony embarrasses the witnesses. Another equally good reason for such an order of exclusion is to secure the proper administration of justice by preserving order and suppressing confusion, or to prevent the presence of dangerous persons. Also, the refusal to admit people after the seats in the courtroom have been filled is deemed proper. But in *People v. Murray*, 89 Mich. 276, 14 L. R. A. 809, 28 Am. St. Rep. 594, 50 N. W. 995, where citizens and taxpayers were excluded by an officer while the seats for spectators were not all occupied, it was held that an order of the court to the officer to "see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in whenever they shall apply," amounted to a deprivation of the constitutional right to a public trial. In the recent case of *State v. Hensley*, 75 Ohio St. 255, 9 L. R. A. (N. S.) 277, 79 N. E. 462, the court made an order, in view of the prospect of immoral and obscene testimony, that no one should be admitted except the jury, defendant's counsel, and members of the bar, and newspaper men, and one other person, who was a witness for the defendant, and it was held on appeal that this exceeded the power of the court, and constituted a denial of defendant's constitutional right to a public trial. But the court recognized considerable discretion on the part of the trial judge in such cases, such as the exclusion of persons whose habits or physical condition rendered them personally obnoxious, or those who interrupted the orderly course of business, and even to clear the room of general spectators when some of them, who cannot be distinguished from others, are so boisterous and insub-

ordinate as to intimidate witnesses. It was further said that persons whose attendance is for the express and only purpose of using the information thus obtained in a way calculated directly to obstruct the administration of justice may be excluded, and added that perhaps the "courtroom loafer," who came only from prurient curiosity, might be excluded; but, in the case under consideration, the court held that the order of exclusion was too general in character, and its limitations of admission too restrictive, saying that "the people have the right to know what is being done in their courts; and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare." A statute in Michigan providing that a trial judge should have discretion to exclude "every person except those necessarily in attendance," when it should appear that evidence of lascivious, degrading or immoral acts or conduct will probably be given, was held, in *People v. Yeager*, 113 Mich. 228, 71 N. W. 491, to be unconstitutional, basing the decision on that of *People v. Murray*, *supra*. It will be seen, therefore, that there is considerable divergence of view among the courts on this question. In most jurisdictions, even when an order of exclusion is held unconstitutional, the court clearly recognizes the right to considerable discretion in the judge, as in *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153, where an order held invalid excluded from the courtroom all persons except the officers of the court and the defendant; but the court, on appeal, admitted that there was no absolute right of all persons, regardless of the conveniences of the court and the due and orderly conduct of the trial, and that the constitutional provision for a public trial must have a fair and reasonable construction in the interest of the person accused. In support of this, Cooley's Constitutional Limitations, page 383, was quoted to the effect that the requirement of a public trial was fairly observed "if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether." But there is certainly much difference in the latitude allowed to the trial judge in different jurisdictions.—*Case and Comment.*

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No. 26.

PITTSBURGH, PA., JANUARY 8, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### S. S. ELECTIC MANF. CO. v. ALLEGHENY COUNTY LIGHT CO.

*Foreign Corporation—Electric light company.  
Eminent Domain—Rights acquired by ordinance.*

An ordinance of a city allowing a foreign corporation to make permanent use of its streets for the purpose of stringing wires and erecting poles is of no effect.

Such a use is to a limited extent an exercise of the right of eminent domain, which must be granted by legislative authority, and a foreign corporation stands in the same position as a private individual.

Another company having the right to string wires and which is materially injured by the maintenance of the wires of the foreign company, may maintain a bill to abate the nuisance.

No. 881 July Term, 1906.

Opinion by SHAFER, J. Filed July 26, 1907.

The bill is for an injunction to prevent the defendant company from interfering with the construction and maintenance of a system of poles and wires for the transmission of electricity in the streets of the city of Pittsburgh. A cross-bill was filed by the defendant to enjoin the plaintiff from maintaining wires on the streets of the city of Pittsburgh so as to interfere in any way with the wires of the defendant company.

#### FINDINGS OF FACT.

1. The Allegheny County Light Company is a corporation of the state of Pennsylvania, organized or existing under the electric light act of May 8, 1889, and having now and having had for a long time past a right by ordinance of the city of Pittsburgh to erect poles and wires on the streets of the city for the conveyance of electricity, in pur-

suance of which right it has for many years in fact maintained and operated poles and wires upon Sixteenth, Seventeenth, Nineteenth, Roland and Carson streets in that city, conducting in some of those wires electricity for arc-lights and in others electricity for incandescent lighting.

2. The South Side Electric Manufacturing Company is a corporation under the laws of the state of West Virginia, having received its charter from that state on September 14, 1905, for the purpose of manufacturing electricity for light and power and manufacturing purposes. Shortly after its incorporation it acquired a power plant in the city of Pittsburgh, near one or more of the streets above mentioned, and proceeded to sell electric current to persons residing in that vicinity by means of wires stretched from house to house across the streets.

3. An ordinance of the city of Pittsburgh was passed by the councils January 25, 1906, and approved by the Mayor, February 3, 1906, granting to the South Side Electric Manufacturing Company, a corporation organized under the laws of West Virginia, the right to enter upon the streets and alleys of the city south of the Monongahela river for the purpose of erecting poles and wires, etc., subject to the terms of a general ordinance in regard to electric, telegraph and telephone lines, and providing that work should be commenced within six months, and the company should pay into the city annually two per cent of its net profits, and should furnish the city such arc-lamps as might be required for lighting the streets on the South Side at a price not to exceed \$75 per lamp, and that within thirty days from the approval of the ordinance it should file with the City Controller a resolution of its directors accepting the provisions of the ordinance. The ordinance was accepted by resolution of the Board of Directors on February 19, 1906, and the resolution filed with the City Controller.

4. On March 14, 1906, the South Side Light Company filed in the office of the Secretary of the Commonwealth a statement showing its principal office and naming its authorized agent as required by the act of 1874, in regard to the registration of foreign corporations.

5. On the same day it also filed in the office of the Auditor General a statement required by the act of June 1, 1889, and its supplements, in which the object and business of the company is said to be "the manufacture and supply of light, heat and power to the public by means of electricity." Prior to March 14, 1906, it had not filed any statement whatever either in the office of the Secretary of the Commonwealth or of the Auditor General, and, so far as appears, has filed no other statement at any time except those of March 14, 1906.

6. Some time in May, 1906, the South Side Company began to erect poles on the streets above named, avoiding as much as possible interference with the poles and wires of the Allegheny County Light Company already erected, by using the opposite side of the street, and endeavoring to go over or under the wires of the latter company where it was necessary to cross. In this endeavor they were not assisted by the Allegheny County Light Company, but on the contrary changes were made in the arrangement of the wires of the Allegheny County Light Company which had the effect of making it more difficult for the South Side Company to place its wires, and after some days at least of maneuvering upon the part of each the Allegheny County Light Company cut two or three heavy wires, which at the time they were cut were lying upon its own small wires, this contact, however, being intended at least to be only temporary during the process of stringing the wire. The bill was thereupon filed by the South Side Electric Manufacturing Company, and some agreement was reached as to the conduct of their affairs until final hearing.

7. It would not be more difficult to regulate the use of the streets by these two companies upon the streets and at the crossings in question in this case than is usual in the case of crossings of such wires generally at any place in the city. The crossing of the wires of the Allegheny County Light Company by those of the South Side Company, and in some instances the poles of the South Side Company, and wires maintained by it to houses and buildings along the street, do in fact interfere and must of necessity interfere to a greater or less extent with the poles

and wires of the Allegheny County Light Company, and require the latter company to incur greater expense for inspection of its wires in that vicinity and the maintenance of the same than would otherwise be required, and the South Side Company's wires, especially at the crossings above mentioned, are a source of danger to the property of the Allegheny County Light Company and to the persons of its employes and customers, not because of any improper construction on the part of the South Side Company, but because of the necessary interference between wires placed upon the same street, and especially crossing each other.

#### CONCLUSIONS OF LAW.

1. The questions in this case are whether the South Side Electric Manufacturing Company has a right to maintain poles and wires upon the streets in question, and supposing it not to have such right, whether the Allegheny County Light Company can raise that question in this proceeding.

2. As to the right of the South Side Company, a foreign corporation, to maintain wires upon the streets, it is contended by the plaintiff in the cross-bill that the foreign corporation was unlawfully doing business in this commonwealth at the time the ordinance above mentioned was passed, at the time it accepted the provisions of the ordinance and up until after the expiration of the time for accepting the ordinance provided in the ordinance itself, and that therefore it was incapable of entering into the contract with the city of Pittsburgh which the ordinance and its acceptance purports to make, and is therefore without any valid consent of the city to enter on the streets; and it is further contended that even if the foreign corporation had been duly registered before the passage of the ordinance its charter can give it no right to use the streets or highways of the city in the exercise of a limited right of eminent domain, and that the ordinance of the city undertaking to give it such right is of no effect.

3. The act of April 22, 1874, P. L. 108, makes it unlawful for any corporation to do any business in this commonwealth until it shall have filed a statement. It is of course plain that no action can be maintained by such a company founded upon the business

thus unlawfully done. This does not, however, prevent such a company from protecting or recovering its property by legal proceedings. *King Optical Company v. Royal Insurance Company*, 24 Superior Court, 527. As the Allegheny County Light Company stands in no contractual relation to the South Side Company, and the present proceedings are not founded upon any contract between them or arises out of any business done between them, we are of opinion that so far as the Allegheny County Light Company is concerned it makes no difference whether the South Side Company is registered or not so far as its rights depend upon the ordinance and its acceptance.

4. The charter of the South Side Company does not, of course, undertake to give it any right to enter upon the streets of the city. Supposing it to be lawfully doing business in this state, or at least not to be doing business unlawfully with the plaintiff in the cross-bill, its right to go upon the streets would seem to us to be precisely the same as those which a private person would have if he had the consent of the city. The first question, therefore, is, what right is acquired by a private person to whom the city undertakes to give the use of the streets for poles and wires, and, second, whether the plaintiff in the cross-bill has standing to complain of such use.

5. We are clearly of opinion that the poles and wires erected in a street are a public nuisance unless the erection is authorized by law, that is, by legislative authority either direct or indirect. In this case there is no pretense of direct legislative authority. The respondent in the cross-bill relies solely upon the ordinance of the city above stated. The use of the street by erecting poles thereon and stretching wires along and across it for the purpose of conveying electricity is a public use, and the right to do so is the exercise, in a limited degree, of the right of eminent domain. We have not been shown any authority in the city charter or elsewhere in the acts of assembly for the grant of such a right by the city, and without such authority it plainly cannot grant to anyone, individual or corporation, the right of eminent domain. There are, no doubt, cases in which the city may be authorized to allow temporary ob-

structions to the streets and temporary user of them by individuals for various purposes, but the user intended to be granted in the present case is a permanent one and the obstruction thereby created is continuous. We are, therefore, of opinion that the ordinance of the city undertaking to allow a foreign company to make a permanent use of the streets does not make that use any less a nuisance than it would have been without such an ordinance.

6. The remaining question is whether or not the plaintiff in the cross-bill is specially injured by that nuisance. As we have found that the poles and wires of the defendant interfere with, and must interfere with, those of the plaintiff in the cross-bill, and require it to incur greater expense in the inspection and management of its wires, and tend to contract the space in the streets which the plaintiff company might otherwise lawfully occupy, we are of opinion that the company plaintiff in the cross-bill is specially and materially injured by the maintenance of the poles and wires of the defendant on the streets in question, and has therefore standing to maintain the bill for their abatement.

It is, therefore, ordered that the bill of the South Side Electric Manufacturing Company be dismissed, and that an injunction issue enjoining the defendant in the cross-bill from constructing or maintaining any wires upon the streets named in the cross-bill in contact with or near any of the wires of the Allegheny County Light Company now constructed or hereafter to be constructed, and that the South Side Electric Manufacturing Company pay the costs.

For plaintiff, *Reed, Smith, Shaw & Beal*.

For defendant, *Murron & McGirr*.

(Common Pleas No. 2, Allegheny Co.)

## H. P. GAZZAM v. BAIR & GAZZAM MANUFACTURING CO.

*Corporations—Insolvency—Receiver—Power of court to appoint.*

Where a corporation is unable to pay its debts in the regular course of business, and is threatened with numerous suits, a court in equity has power upon petition of a stockholder to appoint a receiver to take charge of the assets and wind up the business.



No. 928 July Term, 1907.

Opinion by FRAZER, P. J. Filed September 23, 1907.

On June 17, 1907, upon bill filed by plaintiff, who is a stockholder in defendant company, alleging its insolvency, and that suits were about to be brought against it by numerous creditors, and upon answer filed by defendant, admitting its insolvency and also all other allegations contained in the bill, George M. Bole was appointed receiver, and upon giving bond entered upon his duties as such officer.

Petitioner asks to have that decree set aside, and denies our right to appoint a receiver for defendant under the circumstances of this case, claiming that such appointment hinders and delays it unlawfully in having and collecting its debts, it being a creditor of defendant. The sole question is our authority to appoint a receiver for an insolvent corporation upon petition of a stockholder or creditor. Our right to make such appointment and take possession of the property of an insolvent corporation for the purpose of turning its assets into money for equitable distribution among the creditors seems clear. Such has been the universal practice in this county in both the Federal and State courts for a number of years, and, we believe, our right to do so has never heretofore been questioned. In *Bispham's Equity*, sec. 578, it is said that courts have jurisdiction to appoint receivers for corporations financially embarrassed in order to preserve their property. A corporation is financially embarrassed when an inability exists to pay its debts in full as they fall due in the usual course of trade or business. That defendant was unable to meet its obligations is not denied. Many cases might be cited in which our courts have appointed receivers under circumstances similar to those in this case. In one case at least, *Cowan v. Plate Glass Company*, 184 Pa. 1, the practice seems to be approved by the Supreme Court. In that case, as in this, the company was a manufacturing corporation and insolvent, and upon petition of stockholders and creditors a receiver was appointed "to take possession of the property and assets of the corporation and administer them under the direction of the Court in such manner as

would best promote the interests of all the creditors and stockholders." The right to appoint a receiver was not questioned, and the Supreme Court, in passing upon the distribution of assets made by the auditor after a sale by the receiver, said:

"The insolvency was a fact. To avoid sacrifice of the assets by execution and sale on many claims, with attendant costs, the Court took possession of the property that it might be turned into money for equitable distribution among all the creditors."

Petitioner's judgment was obtained after the appointment of the receiver. It therefore has no advantage over other unsecured claims, and by the appointment of a receiver we are not hindering or delaying a creditor whose judgment was obtained before the receivership or an execution creditor whose execution was issued before the receivership, as was the case in most of the cases cited by petitioner's counsel. The insolvency of the corporation being admitted, and numerous suits against it threatened, it seems to us a winding up of its affairs by a receiver will entail less expense, can be done more expeditiously, and will certainly result in a greater extent to the advantage and best interests of both creditors and stockholders than by numerous sales and distributions by the sheriff.

And, now, September 23, 1907, the prayer of the petition is refused and the rule to intervene and set aside the appointment of the receiver is discharged.

For plaintiff, *Shiras & Dickey*.

For defendant, *McKee, Michell & Patterson*.

(Common Pleas No. 2, Allegheny Co.)

### POWERS v. WILSON.

*Lateral support — Grading lot — Change of grade in street — Injunction.*

Where plaintiff files a bill in equity to restrain the grading of an adjoining lot and removing the lateral support after the grading is practically all done a decree will be refused.

No. 62 April Term, 1907.

Opinion by SHAFER, J. Filed August 8, 1907.

The bill is for an injunction to restrain the

defendant from excavating and blasting on his lot adjoining the lot of the complainant; to require the defendant to erect a wall or other support for complainant's lot, and for damages for the removal of lateral support for the lot.

#### FINDINGS OF FACT.

1. The complainant is the owner of a lot in the Sixth ward of the city of Pittsburgh which extends 22 feet and 6 inches along Forbes street and runs back of the same width 80 feet to Lomond street, with a two-story brick dwelling thereon fronting on Lomond street, and the defendant is the owner of the lot adjoining the same on the west.

2. Forbes street is one of the principal thoroughfares of the city, and was many years ago graded in such a way as to leave the lots above mentioned some 30 feet higher than Forbes street at the side of the street, and the person who was at that time the owner of the complainant's lot, and through whom she derives her title, received damages from the city for the change of grade.

3. Lomond street at the lots in question is 57½ feet higher than Forbes. The street itself is 40 feet wide, and in front of the properties in question is not graded, but is 10 feet lower on the side next Forbes street than on the other side. It is accessible only at one end.

4. The defendant made a contract on December 31, 1901, with the Boyd Hill Brick Company to excavate lots on Forbes street belonging to the defendant or under his control, including the lot adjoining that of the complainant, so as to reduce those lots to grade of Forbes street, the contract putting into the hands of the Boyd Hill Brick Company as an independent contractor control of the means of accomplishing the result.

5. At the time of the filing of this bill the defendant had cut down his lot, adjoining the lot of the complainant, to or nearly to the grade of Forbes street in front, there being still a considerable amount of grading to do in the rear of the lot to reduce it to that level. The cut made along the line between the lots of the plaintiff and defendant is practically perpendicular, all of it, except about ten feet at the top being through rock, which needs no support. Above this rock

there is a certain amount of earth on the plaintiff's lot, a portion of which in the rear of the house has slipped down into defendant's lot. The excavation on the lots of the defendant began some time in 1905, and on the lot in question was made in 1906 and 1907. The further excavation of defendant's lot to the grade of Forbes street will not, by reason of the nature of the rock wall above mentioned, affect plaintiff's lot any or further than it is now affected.

6. The only measure of damages which the plaintiff undertook to show was the difference in market value of her lot before and after the making of the excavation by the defendant. Upon this matter, however, we find that by reason of the value of Forbes street property in comparison with property which is only accessible on Lomond street, the property of plaintiff has been in fact considerably enhanced in value by reason of defendant's excavation, as that excavation renders it more easy and practicable to reduce plaintiff's lot to the grade of Forbes street, so that upon that measure of damages the plaintiff has lost nothing whatever.

7. The plaintiff also complains that in making the excavation the defendant used blasts which made cracks in her property and threw stones upon her lot. All of the blasting was done by the Boyd Hill Brick Company, the contractor.

#### CONCLUSIONS OF LAW.

1. The defendant contends that the cutting down of the grade of Forbes street is an invitation to the abutting property holders to reduce their lots to that grade; that having accepted damages for the change of grade they are not in a position to claim that the adjoining owners who cut down their lots to the established grade have injured them by taking away lateral support, and that otherwise every owner in the block would be prevented from bringing down his lot to the established grade until he had the consent of every other owner or at least of the adjoining owners. Whether the ordinary rule as to lateral support is to be considered modified and to what extent in a city or town by the change of grade of the street upon which the lot abuts is a question which might become important in a city situate as Pittsburgh is. No case has been

called to our attention in which the matter is discussed, and we do not deem a decision of it to be material in the present case.

2. As the plaintiff did not begin this proceeding until the damage to her property, if any, was substantially all done that will or can be done by the excavation of defendant's lot to the grade of Forbes street, she is not entitled to an injunction against the further grading of the lot, and as she has not given the Court any evidence in regard to damages except upon the theory that her lot has been diminished in value, which has been decided against her, she is not entitled in this proceeding to an decree for damages.

3. Any damage to the plaintiff's lot caused by blasting in an improper manner or the removal of the earth and rock from defendant's lot is chargeable not to the defendant but to his contractor, the Boyd Hill Brick Company.

It seems to us, therefore, that the plaintiff has not shown herself entitled to any relief in equity, and the bill is therefore dismissed, the costs to be paid by the plaintiff.

Sur exceptions to finding of fact and conclusions of law. Filed September 30, 1907.

We have carefully examined the exceptions filed by the plaintiff to the findings of fact and conclusions of law filed herein and considered the arguments and briefs of counsel furnished thereon, and find no reason to change the conclusions heretofore arrived at. Had there been an exception to the disposition of the costs we might have considered the suggestions made upon the argument that under the circumstances of the case, considering the fact that the defendant had excavated some part of the plaintiff's land, a part of the costs might properly have been placed upon him. In the absence of an exception we consider ourselves without power to make any change in this respect.

For plaintiff, *J. Smith Christy and W. Clyde Grubbs.*

For defendant, *Chantler & McClung.*

Upon renewing a note for a debt, it is held, in *Bramblett v. Deposit Bank (Ky.)* 6 L. R. A. (N. S.) 612, that accrued interest may be added to its face, and the combined amount form the principal of the new note, without violating the usury laws.

## Court of Common Pleas,

WESTMORELAND COUNTY.

### COMMONWEALTH for use, etc., v. DONNELLY'S ESTATE.

#### *Mortgage—Recording—Mistake—Name.*

A mortgage was given by William F. Uebing, recorded October 5, 1891, and indexed under the name of William F. Nebing; another mortgage given by William F. Uebing on the same property, April 4, 1902, eight years after the recorder of deeds' term of office had expired, was properly indexed under the name of William F. Uebing. An action was had on the second mortgage indexed under the name of William F. Uebing and the money made by the sale was appropriated to that mortgage. In an action against the executors of one of the sureties on the official bond of the recorder of deeds, the defendant set up the bar of the statute of limitations. Held, that section 4 of the act of April 4, 1798, 3 Smith 332, applied and the statute of limitations began to run from the time the mistake was made in the indexing, and not from April 4, 1902, when the second mortgage was recorded.

No. 552, May Term, 1906.

Assumpsit in official bond. Verdict for defendant. Rule for new trial.

Opinion by DORV, P. J. Filed June 29, 1907.

The defendants are the executors of Henry G. Donnelly, deceased, who was one of the sureties on the official bond of W. B. Conway, recorder of deeds of this county for three years from the first Monday of January, 1891. During his term as recorder, a mortgage given by William F. Uebing was presented for record and was duly recorded October 5, 1891. But by a mistake the same was indexed in the name of William F. Nebing. Eight years after Conway's term had expired, to wit, April 4, 1902, another mortgage given by William F. Uebing on the same property covered by the former mortgage was placed on record. Before any money was advanced on what may be called the second mortgage, a careful search was made of the record without discovery of the first mortgage which was improperly indexed. After due proceedings on the first mortgage, the property was sold by the sheriff, and the sum of \$945.57 was appropriated

to the mortgage first on record, and nothing to the one held by the use plaintiffs. Suit was brought April 11, 1906 to recover the sum of \$945.57 with interest from February 24, 1906, the date of the confirmation absolute of the sheriff's distribution. The action was, therefore, brought more than twelve years after the term of the recorder had ended, and more than fourteen years after the negligent act which caused the loss.

The only defence is the statute of limitations. If this be no bar, it is conceded that the plaintiff is entitled to judgment in the sum of \$945.57, with interest from February 24, 1906.

The defendant relies on second 4, act of April 4, 1798, 3 Smith 332, which provides that no suit shall be brought against the sureties of any public officer after seven years, "to be computed from the time at which the cause of action shall have accrued." The plaintiff contends that the cause of action did not accrue at least until the second mortgage was placed on record on April 4, 1902, and that, therefore, the action is not barred.

The mistake in the indexing occasioned the ultimate loss. It is not pretended that there was fraud or concealment. The whole question is whether the action accrued at the time the act of negligence was committed, or when a party prejudiced by such negligence was in a position to bring suit. The exact question has not been decided. No case precisely alike in facts has been discovered. In analogous cases, however, the principle which controls is readily ascertained.

It seems to be well settled that the statute bars an action of tort six years after the wrong done. Thus in *Owen v. Western Saving Fund*, 97 Pa. 47, which was action against a recorder for a false certificate, it was held that the statute began to run from the time the certificate was given and not from the development of damages.

Suit was brought against directors for an illegal resolution, but in *Link v. McLeod*, 194 Pa. 566, it was held that the statute ran from time the resolution was passed and not from the time the money was paid. And in both cases last cited it was recognized that ignorance of the transaction did not toll the statute. The principle is, therefore, settled

that to an action brought for injuries resulting from an act done more than six years before, through mere mistake, was involving fraud, the statute of limitations is a complete bar. See also *Noonan v. Purdee*, 200 Pa. 474; *Guarantee Co. v. National Bank*, 200 Pa. 94.

An apparent exception to the rule is found in *Lewy v. Coke Co.*, 166 Pa. 536, wherein an action after six years from the wrong done is sustained. The decision, however, was by a divided court, and it was put on the express ground that the concealment of the wrong was a fraud. But the case has no application here as fraud is not alleged.

It is contended, furthermore, that the line of cases does not control because they all arise under the act of March 27, 1713, and not under the act of 1798, which is relied on by the defence. But such contention is not well founded. The acts are substantially the same. Under the act of 1713 no action of case can be brought after six years from the "cause of such action." While under the act of 1798 the same thing is expressed thus: "That no suit . . . shall be brought after seven years from the time at which the cause of shall have accrued." Whether the limitation be from the cause of such action or from the time the cause of action shall accrue gives rise to no distinction. The expressions mean the same thing, as uniformly, under the act of 1713, it has been held that the statute begins to run from the time the right of action accrues. *Overton v. Tracy*, 14 S. & R. 328; *Evans v. Lee*, 23 Pa. 88.

An action of case against the recorder himself would likely be defeated by application of the principal declared in *Owen v. Savings Fund*, supra. If it has no application in a suit against the sureties, the whole purpose of the act of 1798, as set forth in the preamble, would be defeated, and sureties on official bonds would be liable to suit many years after the terms of the principal had ended.

Defendants' further reliance is on a line of cases of which *Marsteller v. Marsteller*, 93 Pa. 150, is the leading example. The cases hold that if a cause of action accrue in the lifetime of the decedent, the statute is not interrupted by the death, but if the action does not accrue until after the death, the statute

begins to run only from the time of administration. It is plain that this principle is not in conflict with that declared in *Link v. McLeod*, supra.

*Binny v. Brown*, 116 Pa. 169, in its facts is a case much like the one in hand. Binny by mistake wrongfully entered satisfaction on the margin of a mortgage. Brown bought the property relying on a certificate from the recorder that he found no unsatisfied mortgages. The mistake was not discovered for fourteen years. The Supreme Court on appeal dismissed the case with the observation that plaintiff's only remedy was an action on the case, a remedy long since barred by the statute of limitations.

And now, June 15, 1907, new trial refused and judgment entered on the verdict.

For plaintiff, *Marker & Hollingsworth*.

For defendant, *Lightcap & Warden, Williams, Sloan & Wegley*.

(From Wm. S. Rial, Esq., Greensburg, Pa.)

### Guest's Right to Room in Hotel.

It is surprising that, after some centuries of development of the law in respect to the relations of guests and innkeepers, there is an almost entire absence of precedents as to what are the rights of a guest in a hotel to a continuance of his occupation of a room when the landlord chooses to transfer him to a different room. In the late case of *Hervey v. Hart* (Ala.) 9 L. R. A. (N. S.) 213, 42 So. 1013, a guest at a hotel in Mobile during Mardi-Gras festivities found, on attempting to return to his room after he had been temporarily absent from it, that he was excluded from its further occupation. He brought an action, alleging that, while temporarily absent from his room, the landlord had caused his baggage to be removed from it, and that he refused to furnish him any other proper accommodations, although it was then late in the night, and the city was crowded with people, so that he could not get accommodations in the city, and that he was compelled to wander about the city for the greater portion of the night, seeking a place to sleep. He offered evidence of these facts, but the evidence of the defendant was somewhat in conflict with it. The jury found against the plaintiff, but a motion for

a new trial was granted, and it was affirmed on appeal. The supreme court declared the law on the subject to be that the innkeeper has the right, and the sole right, to select the apartment for a guest, and, if he finds it expedient, to change the apartment, and assign the guest to another, without becoming a trespasser in making the change; that, if he offers proper accommodations in lieu of the room which is taken away from the guest, he is not liable; but if, having the necessary convenience, he refuses to afford reasonable accommodation, he is liable to an action for damages. The court relied upon the Canadian case of *Doyle v. Walker*, 26 U. C. Q. B. 502, which lays down the same doctrine. These seem to be the only decisions that are directly in point, and both deny that a guest to whom a room is assigned acquires any right to occupy it beyond the discretion of the landlord, provided, only, that the landlord gives him other proper accommodations.—*Case and Comment*.

An equitable remedy given a cestui que trust to follow trust funds into property in which they may have been fraudulently invested by his trustee is held, in *Chavez v. Myer* (N. M.) 6 L. R. A. (N. S.) 793, not to be taken away by statutory provisions affording a remedy by attachment or garnishment.

In the absence of statutory authority, a municipal corporation is held, in *Linne v. Bredes* (Wash.) 6 L. R. A. (N. S.) 707, to have no power by ordinance to make delinquent water rentals a lien upon property as against a subsequent owner or occupant who did not contract the charges or make default in their payment.

Where a lease provides that the landlord shall have at all times the right to distrain for rent due, and shall have a valid and first lien upon all the personal property of the tenant, it has been held, in *re Robinson & Smith*, 18 Am. B. R. 563, that the lien thus created, though it did not attach by the levy of a distress warrant until two days before the filing of a petition in bankruptcy against the tenant, is preserved by section 67d of the Bankruptcy Act.

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PITTSBURGH, PA., JANUARY 15, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### FORSYTH v. COLONIAL TRUST COMPANY, Admr., et al.

*Equity—Loches—Property in hands of a  
stakeholder.*

Where certain bonds the title to which is in dispute are in the hands of stakeholders, and either party may bring suit to determine the ownership, one party cannot be charged with laches in bringing the suit.

No. 9 April Term, 1907.

Opinion by SHAFER, J. Filed September 17, 1907.

The prayer of the bill is that the Court will adjust the title and ownership of certain bonds now in the custody of C. Jutte & Co., one of the defendants, as between the plaintiff and the other defendant, and decree the delivery of those bonds by C. Jutte & Co. to the plaintiff. The Colonial Trust Co., administrator, defendant, answers substantially that it does not know whether the bonds belong to the plaintiff or not, and joins in the prayer of the plaintiff that the Court shall determine the ownership of the bonds. C. Jutte & Co., the other defendant, answers the bill, admitting the possession of the bonds and their willingness to turn them over either to the plaintiff or the other defendant, as the Court shall direct.

#### FINDINGS OF FACT.

1. F. J. Forsyth, the plaintiff, was a resident of McKeesport in Allegheny county, and died after the filing of the bill herein and before the hearing, Alberta Forsyth, his executrix, having been substituted as a party plaintiff before the hearing.

2. The Colonial Trust Co. is a corporation under the laws of Pennsylvania, authorized to execute trusts, and was duly ap-

pointed administrator of the estate of W. C. Jutte, deceased, who died intestate May 25, 1905. The other defendant, C. Jutte & Co., is a corporation under the laws of Pennsylvania, having its principal office in the county of Allegheny, and being engaged in the business of mining and shipping coal.

3. In 1892 the plaintiff and one Jordan S. Neel entered into a partnership for the purpose of operating a coal mine for the term of fifteen years, the partnership to continue notwithstanding the death of either party, the article providing that Neel was to contribute certain coal property and Forsyth was to receive a salary. Neel thereupon leased certain coal to the new firm known as P. J. Forsyth & Co. for fifteen years, or until the coal should all be mined out if mined before that time, and the partnership proceeded to mine the coal.

4. In the early part of the year 1901 the plaintiff, Forsyth, and W. C. Jutte became partners as the McKeesport Saw Mill Company, which was incorporated in June, 1901, by the same name.

5. Some time before July, 1901, W. C. Jutte obtained a charter for a company known as the Pike Land Company, in which he was the owner of all the stock, a few shares being held by certain persons for him to enable them to act as directors and other officers. At or about the same time he also organized the defendant, C. Jutte & Co., and his intention was to purchase coal lands and put the title of them in the Pike Land Company, and then to turn them over to C. Jutte & Co. and receive from C. Jutte & Co. its stock and bonds in payment therefor. In pursuance of this scheme certain coal, including the coal above mentioned as leased to P. J. Forsyth, was purchased from the estate of Jordan S. Neel, and on July 20, 1901, deeds were made by the representatives of the estate of Jordan S. Neel, deceased, to the plaintiff, P. J. Forsyth, for this coal, the consideration named being \$117,000, and on July 26, 1901, Forsyth made to Jutte a mortgage of the same property for \$137,000 odd dollars.

6. On November 30, 1901, W. C. Jutte attempted suicide by shooting himself in the head at Atlantic City.

7. On December 24, 1901, an agreement

in writing was entered into between C. Jutte & Co. and the plaintiff, which is printed in the the third paragraph of plaintiff's bill. This agreement recites the deed from Neel's estate to Forsyth and the mortgage above mentioned, the intention of Jutte to have the lands conveyed to the Pike Land Company and from it to C. Jutte & Co., and the issue of a mortgage upon all the property of C. Jutte & Co.; the claim of Forsyth to \$50,000 worth of the coal to which he held the title; his assertion that the agreement between himself and Jutte was in writing, but that Jutte by reason of his attempt at suicide had been prevented from signing it; that Jutte was confined to his house and unable to attend to business; that the financial condition of C. Jutte & Co. imperatively required the carrying out of Jutte's plans in regard to the land; that C. Jutte & Co. intended to issue \$1,000,000 of bonds on the tracts of coal and other properties as soon as acquired, and provides that Forsyth shall convey the coal in question to the Pike Land Co.; that his mortgage shall be surrendered to him; that C. Jutte & Co. shall issue the \$1,000,000 of bonds, using them first to finance C. Jutte & Co., second, to pay off liens on the real estate, and then to set aside and deposit \$50,000 of the bonds, the ownership of these bonds to be adjusted between Forsyth and Jutte.

8. This agreement was carried out by the making of the conveyances required by it, the issue of the bonds of C. Jutte & Co. and the setting aside of \$50,000 of them under the agreement, although the same were not deposited with any other person.

9. Jutte recovered sufficiently from his injuries to come to his office and attend to business in January or February of 1902, and continued to carry on business at his office in Pittsburgh until his death, with the exception of certain visits to Europe, New Orleans and other places. Jutte and Forsyth had their desks in the same room during that time up until Jutte's death, and they were jointly interested in the affairs of the McKeesport Saw Mill Company and other enterprises during that time.

10. In June, 1903, C. Jutte & Co. found it necessary to issue \$1,600,000 of bonds instead of \$1,000,000, and the issue of \$1,000,-

000 was cancelled, including the \$50,000 of bonds set aside under the agreement above mentioned, and bonds were issued in the amount of \$1,600,000, and \$50,000 par value of the new issue of bonds was set aside in lieu of the bonds mentioned in the agreement, and these bonds remained in this situation at Jutt's death.

11. The plaintiff, after Jutte's death, demanded of the Colonial Trust Co., his administrator, one of the defendants, that it cause the bonds in question to be turned over to him, which the administrator has refused to do upon the ground that it is not informed as to the real ownership of the bonds.

We do not understand that there is any substantial dispute between the parties as to the facts above found. The matter in dispute is whether or not Forsyth was entitled to receive from Jutte \$50,000 of the bonds in question. As the parties are both dead and the contract is not evidenced by any writing signed by the parties, the proof is necessarily confined to the admission of the parties. The evidence as to these admissions on the part of Jutte is that of Mr. Galbraith, Mrs. Jutte, C. M. Buchanan and H. H. Warfel. The evidence of Mr. Galbraith was strenuously objected to by the defendants on the ground that Mr. Galbraith had been attorney for Mr. Jutte, and that his testimony would be a violation of the confidence owning by attorney to client. This objection was overruled on the ground that what Mr. Galbraith was testifying about was solely as a director of the Pike Land Co. and not as attorney. That of Mrs. Jutte, the widow of W. C. Jutte, was also objected to as being a confidential communication to her by her husband and against the interests of her husband's estate. This objection was overruled on the ground that the communication itself was not confidential, but, on the contrary, as stated by the witness, was a request of her to make known, if occasion should arise, what he then told her.

12. From the evidence of these witnesses and all the circumstances of the case, we are convinced that it was part of the understanding between Forsyth and Jutte, when Forsyth took the legal title to the Neel coal property, that he was to convey this prop-

erty to the Pike Land Co., or as Jutte should designate, and receive \$50,000 of the issue of bonds Jutte was then in contemplation of making on all the coal properties which Jutte was engaged in acquiring, this being his payment of whatever rights Forsyth had in the coal as a lessee which his deed would pass, along with the rights acquired from the Neel estate, and also, perhaps, partly in compensation for his services in the sale. It does not appear that he was actively engaged in procuring the coal land for Jutte, but it does appear that he acted as a holder of the title and gave a bond and mortgage upon it, which services were undoubtedly of some value.

#### CONCLUSIONS OF LAW.

1. It is claimed by the Colonial Trust Co., administrator, that there is no jurisdiction in equity to grant the relief prayed for in the bill, and that the plaintiff has ample remedy at law. We do not deem it necessary to discuss the merit which this claim might have under other circumstances, but inasmuch as the answer of the Colonial Trust Co., administrator, expressly says that it "joins in the prayer of the plaintiff that this Court should determine the title and ownership of said \$50,000 of bonds," and the case was brought on to trial with that statement standing in the answer, it does not now lie in the mouth of the defendant to object to the jurisdiction. We do not understand C. Jutte & Co., the other defendant, to make any such objection, but if it does it is met with the statement in its answer that it is ready and willing to deliver over the bonds as the Court shall direct, and because it is a mere stockholder, and is bound by any adjudication which binds the interested parties.

2. It is strenuously argued by the defendant administrator that the plaintiff ought not to have relief because he had been guilty of laches, in that he did not begin proceedings to establish his right to the bonds for five years after his right is supposed to have accrued. We are of opinion, however, that it has not been shown that the plaintiff was guilty of laches. In the first place, it will be observed that the contract between Forsyth and C. Jutte & Co., dated in December, 1901, was not that

bonds were then in fact laid aside for Forsyth and Jutte to determine the ownership of, but that when C. Jutte & Co. should be financed and all the liens on all the real estate of C. Jutte & Co. paid off, then the bonds should be set aside. There was no evidence given that we can remember as to when these events took place. The bill does not aver directly that they ever did take place, but avers that the bonds were in fact set aside, and from other allegations of the bill this may be inferred to have been before June, 1903. It nowhere appears, however, that Forsyth knew that these bonds had been so set aside at that time, or when he learned that fact. Secondly and principally, however, we think Forsyth is not chargeable with laches for the reason that this is not a case where one of the parties is in possession of the matter in dispute and the other is out of possession, and only one party is able to begin a proceeding. In the present case the subject matter of the dispute was in the hands of a third party, and this was equally known to each of them. Jutte knew in January, 1902, as appears by the evidence, of the contract between Forsyth and C. Jutte & Co., and he knew that he did not get \$50,000 of the bonds which otherwise would have come to him from C. Jutte & Co. and and that they were in the hands of a stakeholder. We cannot see that it was any more the duty of Forsyth than of Jutte to move in the matter of determining their ownership. Laches is harmful delay. The delay of Forsyth in this case seems to us could not harm Jutte, because Jutte had it in his power equally with Forsyth to have the contest determined.

3. The defendants also contend that the evidence given by the plaintiff, even if believed by the Court, is not sufficient in kind and not sufficiently definite to justify a finding in favor of the plaintiff, it being insisted upon that this is a claim against a decedent's estate as for a debt of the decedent, which the courts have frequently said should be carefully scrutinized where it depends upon oral admissions. While we are of opinion that the evidence, if believed, is sufficient to warrant the findings which we have made even in that view, we would suggest that it is by no means certain that the burden of



proof is upon the plaintiff. The plaintiff became the legal owner of certain coal interests which were paid for by Jutte and therefore belonged to Jutte. He was himself, however, the owner of an interest in the same lands in his own right. At the request, or at least with the acquiescence of Jutte, he conveyed not only the interests which he held for Jutte as trustee but also his own for a lump sum, and the bonds in question were put up by or for the grantee as part of the purchase money, and Jutte acquiesced in this arrangement by accepting the benefit of the transfer made on the faith of it. It seems to us, therefore, that it might be argued that upon an issue joined between Forsythe and Jutte as to the ownership of the bonds the burden would be upon Jutte to show that he was entitled to more of the purchase money than he got rather than upon Forsyth to show that he was not to give up his estate for nothing. We are of opinion, therefore, that the plaintiff is entitled to the relief asked, and it is adjudged and decreed that the \$50,000 of bonds of C. Jutte & Co., described in the bill and now held by C. Jutte & Co. until the title and ownership thereof shall be adjusted between the plaintiff and Jutte's representative, belong to the estate of the plaintiff, P. J. Forsyth, and it is ordered and decreed that defendant, C. Jutte & Co., deliver to plaintiff the said bonds, with all the coupons thereon showing interest from April 1, 1903, or in case said coupons or any of them cannot be delivered, that they pay to the plaintiff the interest represented thereby, and that C. Jutte & Co. be thereupon discharged from all claims and demands of the Colonial Trust Co., administrator of W. C. Jutte, for or on account of the said bonds or the interest thereon, and that the costs be paid one-half by the plaintiff and the other half by the Colonial Trust Co., administrator of W. C. Jutte.

For plaintiff, *Weil & Thorpe.*

For defendant, *Reed, Smith, Shaw & Beal.*

That the administrator of an insolvent trustee cannot be compelled to redeem from the general assets of the estate trust property pledged by the trustee as collateral to a loan for his individual benefit, is declared in *Lowe v. Jones* (Mass.) 6 L. R. A. (N. S.)

## Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of GEO. B. FORSTER,  
Deceased.

*Will—Demonstrative Legacy — Distribution of  
Stocks to Guardian.*

Testator gave certain specified personalty to his wife, alleged to have been the whole of his estate when the will was executed, he subsequently acquired other property. There being no residuary clause. Held, that he died intestate as to it.

Testator gave a legacy of "\$4,000 cash deposited with Carnegie Steel Co., Munhall." He drew out \$2,000 of this deposit before his death. Held, that the legacy was demonstrative, and that the deficiency in the deposit should be made good out of part of the estate as to which he died intestate.

When stocks of an estate have not been sold by an administrator, and it is to the advantage of a minor that his interest therein shall be distributed in kind, to the guardian such distribution will be made; and the guardian will only be liable for ordinary prudence in disposing of them thereafter.

No. 286 September Term, 1907.

Opinion by OVER, J. Filed December 20, 1907.

### OPINION.

George B. Forster died testate January 11, 1906, leaving to survive him a widow and one child. His will not dated, but which was executed "on Saturday before Christmas, 1903," is as follow:

"Below please note money belonging to my wife if I should die.

\$9000 First mortgage bonds, Fidelity Title & Trust Co. Box 8088. \$4,000 cash deposited Carnegie Steel Co., Munhall. \$532.57 cash deposited Monongahela Trust Co., Homestead. 400 stock of Homestead Coaster Co. In box. Five shares of U. S. Steel stock, par value \$100. In box. \$6,000 First M. Bonds U. S. S. held by Carnegie Steel. John Forster \$100, John B. Jones \$75, Thos. Forster \$80, R. B. Bostwick \$50, Walter Forster 150 money

Wm. Forster 25 loaned.

Insurance paid.

Geo. B. Forster.

Witnesses:

John B. Jones, Jr.

Ralph E. Jones."

There is no evidence that testator when he executed his will had any other property than that specified in it, and there is some evidence tending to show that he did not. After its execution he acquired the following property, viz: Ten shares of Homestead Lumber Company stock, purchased with \$2,000 of the \$4,000 cash deposited with the Carnegie Steel Company when he executed the will; 31 shares of preferred stock of the United States Steel Corporation; 2 bonds German Club, Pittsburgh, Pa.; 2,500 shares Big Elk Gold Mining Company stock; 1,000 shares Crystal Flour Spar Mining Company stock; 1,000 shares Goldfield Double Eagle Mining Company stock.

It is contended by the widow that he intended in his will to give this property to her also. This contention is founded on the assumption that the property specified in the will was the whole of his estate, and it is argued that the inference is that he did not intend to die intestate as to any part of his estate, and that the will should be construed as if he had given his whole estate to his wife. Whilst this assumption may be the fact, it does not appear conclusively that it is, and for ought we know he may have had other property. What does appear, however, is that he specified the stocks, bonds and amount of money which he gave to his wife, and we are not at liberty to conjecture that this was his whole estate, nor that it was his intention to give anything more than is specified in his will, and as there is no residuary clause, he died intestate as to that portion of his estate not mentioned in it.

Subsequently to the execution of the will he drew out \$2,000 of the \$4,000 deposited with the Carnegie Steel Company, and invested it in the purchase of ten shares of Homestead Lumber Company stock, which is in the possession of the accountant, and the question arises as to whether the \$4,000 legacy is adeemed to that extent. The answer to this question depends on whether the legacy was specific or demonstrative. The will is very informal, it is doubtful, and a matter of conjecture whether testator intended to give his wife a legacy of \$4,000 payable primarily out of the money deposited with the steel company, or to give her the particular \$4,000 deposited there. If the former

was his intention the legacy is demonstrative, not liable to ademption, and the deficiency in the deposit must be made good out of the part of the estate to which there is intestacy, *Smith's Appeal*, 103 Pa. 561; *Wall v. Stewart*, 16 Pa. 275; *Balliett's Appeal*, 14 Pa. 461. If the latter, the legacy was specific and adeemed to the extent of the depletion of the deposit. "Courts are averse to construe legacies to be specific, and will not, unless it be clear that the testator so intended," *Smith's Appeal*, supra; and "uniformly in such cases lean to a construction which shall declare the legacy demonstrative rather than specific," *Harmon's Estate*, 158 Pa. 637. Here the testator's intention to give his wife a legacy of \$4,000 is clearly expressed, but as it is doubtful whether he intended the legacy to be demonstrative or specific, under the authorities cited, it must be construed to be demonstrative, and the deficiency in the deposit out of which it is primarily payable made good out of the estate as to which there is intestacy, and as to that part of the estate, the widow takes under the intestate laws one-third, *Reed's Estate*, 82 Pa. 428.

The greater portion of decedent's estate as to which he died intestate consists of stocks, some of which have no market value, and some bonds. The trust officer of the administrator gives the following reasons for not converting them:

"The reason the stocks were not converted was because the will mentioned all of the stocks specifically, with the exception of three or four items of Gold Mining stock, and I was of the opinion that the will not only covered what was mentioned, but what had not been specifically devised, and therefore it all went to the widow; she didn't want them converted, wanted to take the stocks and bonds in kind. Also for the further reason that had I converted the U. S. Steel preferred stock into cash prior to this year I would have lost the bonus of five dollars a share per year, which was allowed by the U. S. Steel Corporation to their employees under the profit sharing plan, which I was able to get as an exception to the regular rule on account of Mr. Forster's death, and on account of him being superintendent, one of the oldest superintendents at Home

stead. Then if we had converted it we would have been entitled to commissions, and I wanted to keep everything at a minimum. The way it stands now is better than if I had converted it, charged commissions and lost the bonus."

There can be no question that the administrator acted in good faith and prudently in the matter; has not been negligent, and if there be any loss on account of depreciation in value, is not liable therefor.

The guardian hesitates to accept distribution in kind; but as the stocks and bonds could not now be converted without sacrificing them, it is for the best interests of the ward's estate that distribution should be made to the guardian, and acting upon our suggestion it has signed an agreement for such a distribution, making a division of the stocks and bonds between the widow and guardian. It is true the guardian could not legally invest the ward's money in these stocks and bonds, but it is not an investment by the guardian but one made by the ward's ancestor, and the guardian is only bound to use ordinary prudence in disposing of the stocks hereafter; Reed's Estate, *supra*.

For plaintiff, *J. Merrill Wright*.

## Court of Common Pleas,

WESTMORELAND COUNTY.

### SELL v. STEVENSON, Admx.

*Judgment—Lien—Renewal—Deed.*

Plaintiff secured a judgment against defendant December 2, 1898. Defendant purchased a tract of land on May 18, 1901, and died September 14, 1903. The widow and heirs of the defendant, deceased, conveyed the tract of land by deed dated June 4, 1904. The judgment being unpaid, the death of the defendant was suggested and administratrix substituted, and on October 18, 1906, a scire facias was issued with notice to the purchaser as terre-tenant and duly served. Held, that the judgment was a lien on decedent's land even though the land was subsequently acquired and not revived before his death.

Sci. fa. sur Judgment. No. 187 February Term, 1899.

Common Pleas, Westmoreland county. No. 383 November Term. 1906.

The case stated was as follows:

And now, May 7, 1907, it is hereby agreed by and between the parties plaintiff and defendant above named, by their attorneys, respectively, that the following case be stated for the opinion of the court in the nature of a special verdict:

1. The plaintiff, John S. Sell, cashier, at No. 187 February term, 1899, in said court, recovered by confession of the defendant, S. C. Stevenson, on December 2, 1898, and in his lifetime, the sum of \$260 debt, with interest from December 17, 1899, and costs.

2. By deed dated May 18, 1901, recorded in the recorder's office of said county in 324 Deed Book 96, the defendant, S. C. Stevenson in his lifetime, purchased in fee, of one Abraham S. Walter a certain messuage, tenement and tract of land, situate in the borough of Scottdale, in said county.

3. Being so thereof seized, the said defendant, Samuel C. Stevenson, departed this life September 14, 1903, intestate, leaving to survive him a widow, Margery B. Stevenson, and three children, to wit, Lucy A., wife of the said terre-tenant, Samuel A. Lowe, Zella B., wife of Ellwood W. Zimmerman, and J. Ed. Stevenson, to whom said real estate descended and came under the intestate laws of Pennsylvania.

4. Letters of administration of the goods and chattels, etc., of the said S. C. Stevenson, deceased, were duly granted September 18, 1903, by the register of wills of said county, to the said widow, Margery B. Stevenson, who duly qualified and assumed the duties of said trust.

5. By deed dated June 4, 1904, duly delivered, and recorded June 21, 1904, in 379 Deed Book 277, the widow of said deceased and his children, with their respective husbands and wife, granted and conveyed the real estate so acquired as aforesaid to the said terre tenant, Samuel A. Lowe, for the consideration of \$6,500, in said deed mentioned.

6. afterwards, July 24, 1905, the said Margery B. Stevenson, admx., as aforesaid, exhibited and filed her account of the administration of the estate of said S. C. Stevenson, deceased, in the register's office of said county, showing no balance for distribution, which account was afterwards confirmed absolutely by the orphans' court of said county

on September 12, 1905, and recorded in 17 O. C. Adm. Docket 310.

7. In her account, so filed and confirmed as aforesaid, the accountant charged herself, *inter alia*, with the sum of \$3,500, part of the proceeds of the "sale of real property in Scottsdale borough to S. A. Lowe."

8. The said judgment recovered by the plaintiff not having been paid in whole or part, the death of the defendant, S. C. Stevenson, was suggested of record on October 18, 1906, and M. B. Stevenson, admx., substituted on the record as defendant. Whereupon the same day a writ of *scire facias* was issued on said judgment to No. 383 November term, 1906, aforesaid, against the said M. B. Stevenson, admx., as aforesaid, with notice to the said Samuel A. Lowe, terre-tenant, which writ was duly served upon them.

If the court be of the opinion that the said plaintiff, under the law, is entitled to recover of the lands as aforesaid, so conveyed to the said Samuel A. Lowe, terre-tenant, as aforesaid, then judgment to be entered for the plaintiff against defendant, administratrix, as aforesaid, *de terris*, but if the court be not of that opinion, judgment to be entered in favor of the plaintiff and against the defendant alone, and in favor of the terre-tenant; the costs to follow the judgment, and the parties reserving the right of appeal.

Opinion by DORTY, P. J. Filed June 29, 1907.

The difficulty, if any, in this case is occasioned by an apparent conflict in the authorities. *Moorhead v. McKinney*, 9 Pa. 265, expressly holds that a judgment *inter vivos* is not a lien on after-acquired real estate during the life of the owner, and at his death becomes a lien as a debt merely. *Baxter v. Allen*, 77 Pa. 468, holds that a judgment, without lien on real estate at the time of defendant's death, does not fall into the class of mere debts whose lien is limited to five years. In the one case the lien was lost by failure to revive in defendant's lifetime; in the other the judgment was no lien on after-acquired real estate. This distinction, which is the only one to distinguish the cases, was not referred to in the later case, and although *Moorhead v. McKinney* was cited at the argument, no reference is made thereto

in the opinion in *Baxter v. Allen*. It follows that the distinction is material or that *Moorhead v. McKinney* no longer controls. It is hard to understand what difference it can make whether the judgment is without lien through failure to revive or because the real estate was acquired after judgment obtained. Neither was a lien before death of defendant and both became liens by reason of his death. The reasoning of the court in *Baxter v. Allen* applies as well to the one class as to the other. *Moorhead v. McKinney* is cited with approval in *Kingmaker v. Brown*, 14 Pa. 273, and followed in *McMurray v. Hopper*, 43 Pa. 472. And in *Bresicker v. Cobb*, 13 Sup. Ct. 66, it is noticed that in *Moorhead v. McKinney* "the judgment never was a lien on the land in question, whilst in *Baxter v. Allen* it was," and suggest that "this is the ground upon which the cases are to be distinguished."

The case in hand in its facts is like that of *Moorhead v. McKinney* in that in each we have a judgment *inter vivos*, after acquired lands and death of defendant. And there is no possible distinction in the case, if the act of June 8, 1893, P. L. 392, is to be construed in the same way as was section 2, act of February 24, 1834. At this point the matter becomes more interesting, and, if possible, more difficult of solution. The language of the two acts is almost identical. The act of 1834 limits the lien of debts of a decedent to five years, "except they be secured by mortgage or judgment." The purpose of the act of 1893 as expressed in its title is "to limit the duration of the lien of the debts of decedents other than those of record on their real estate." It is plain, therefore, that there is nothing in the language of the act of 1893 which justifies a construction different from that given to the act of 1834.

In this dilemma what is to be done? The case in hand is very like that of *Moorhead v. McKinney*. The latter was governed by the act of 1834; and this by the act of 1893. The judgment here became a lien September 14, 1903, by the death of the decedent, but the *scire facias* to revive was not issued until October 18, 1906, or more than two years after the death. In the meantime the property was sold, to wit, on June 4, 1904. The

question is: Was said judgment then a lien on such real estate? Originally the debts of a decedent were liens upon his real estate for an indefinite period. Without considering prior legislation; the act of June 8, 1893, limits the lien of debts of decedents other than those of record to two years. The exact language of the act is: "That no debts of a decedent dying after the passage of this act, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor." If at liberty to follow the plain language of the act, the matter is readily solved. The title shows the purpose of the act is to limit the duration of the lien of debts of decedents other than those of record, and in section 1 there is an express exception of debts secured by mortgage or judgment. In this case there was a debt of record, a debt secured by judgment, and by the plain terms of the act the limitation provided does not apply. No elaboration could make the language more clear. In plain and unambiguous terms it is declared that the act has no application to a debt in judgment.

Although we confess inability to discover any substantial difference in the language of the two acts, and cannot appreciate the distinction which it has been said may possibly distinguish *Baxter v. Allen* from *Moorhead v. McKinney*, at this juncture our course is a clear one. We are constrained to hold that the act of 1893 does not apply because such is the unmistakable language of the act itself, and because such construction is declared in *Bresecker v. Cobb*, 13 Sup. Ct. 56. And with this act eliminated there is plain sailing, as the act of 1834 has no application because the action to revive was brought within five years from the death of the debtor.

And now, June 29, 1907, judgment in favor of the plaintiff and against the defendant, M. B. Stevenson, administratrix of S. C. Stevenson, deceased, *de terris* with notice to Samuel A. Lowe, *terre-tenant*.

For plaintiff, *Williams, Sloan & Wegley*.

For defendant, *Ogden & Dom*.

(From Wm. S. Rial, Esq., Greensburg, Pa.)

### Book Notice.

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Where, upon petition for the appointment of a receiver, the creditors show no assets of the alleged bankrupt except those directly involved in a foreclosure suit, the case of *Matter of McKane*, 18 Am. B. R. 594, holds that they will be required to furnish a bond to pay the expenses of the receivership if sufficient assets applicable to that purpose are not discovered.

It has been held, *In re Kehler*, 18 Am. B. R. 596, that where an alleged bankrupt is judicially adjudged insane after the filing of the petition in bankruptcy, court has jurisdiction to administer his estate where its jurisdiction is based upon acts of bankruptcy alleged to have been committed while he was sane.

# Pittsburgh Legal Journal

ESTABLISHED 1853.

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THOMAS EWING, }N S. Vol. XXXVII. }  
O. S. Vol. LIV. }

No. 28.

PITTSBURGH, PA., JANUARY 22, 1908.

## Circuit Court, United States,

WESTERN DISTRICT OF PENNA.

### CAIN v. THE HOCKENSMITH WHEEL & CAR CO.

*Attorneys' fees—Privy of payment—Money  
paid into court—Attachment.*

A claim for counsel fees in favor of plaintiff's attorneys, upon a judgment recovered by them for their client, cannot be preferred over a prior attachment levied on the money in the hands of the defendant as garnishees.

No. 35 November Term, 1904.

Opinion by ARCHBALD, D. J. Filed December 19, 1907.

The question to be disposed of upon this motion is whether a claim for counsel fees in favor of plaintiff's attorneys, upon a judgment recovered by them for their client, is to be preferred over a prior attachment levied on the money in the hands of the defendants as garnishees. The facts are not in dispute and are as follows:

On June 25, 1904, the plaintiff, W. A. Cain, having a disputed claim against the Hockensmith Wheel & Car Co. for construction work done in the winter and spring of 1903, employed Benjamin H. Thompson, Esq., an attorney-at-law of Pittsburg, Pa., to prosecute it, agreeing to pay him 10 per cent in case of a settlement without trial, or 25 per cent of the amount recovered in the event that a jury trial was necessary; and in order to secure Mr. Thompson, an assignment of so much of the claim as would cover the fees and costs was executed. Thereupon, no settlement having been effected, suit was brought in this court on September 8, 1904, and was so proceeded with that a verdict in favor of the plaintiff was recovered on May 25, 1906, on which a judgment for \$2,447.12 was subsequently entered.

The case was stubbornly contested, and it was only by the exercise of more than ordinary professional skill that a verdict in favor of the plaintiff was secured, the counsel engaged fully earning all that was stipulated for.

It appears, however, that on October 16, 1903, a fraudulent debtor attachment, under the Pennsylvania act of 1869, was issued by the Kittanning Safe Deposit Company in the Common Pleas of Westmoreland Co., Pa., against the plaintiff here, in which the Hockensmith Wheel & Car Co. were named as garnishees. There was no service of the writ upon Cain, who was a resident of Ohio, and as to him it was returned not found. But a service was effected on the garnishees on October 17, 1903, and after certain interlocutory proceedings, not necessary to notice, a verdict and judgment having been recovered in this court, as stated above, and a judgment by default having also been entered against Cain in the attachment proceedings, the garnishees admitted being indebted to him and having moneys of his in their hands, to the amount so recovered, upon which judgment therefor was accordingly entered against them. Being notified, however, of the claim of Mr. Thompson to counsel fees and the assignment made to him, and being thus between two fires, the garnishees asked leave to pay into court here what was found to be due from them, and this having been allowed, it is now to be determined, as stated above, whether the claim for counsel fees is to prevail over the attachment, reducing by so much the amount which the attaching creditors would otherwise be entitled to take out of court, the entire fund being required to satisfy the judgment which they held.

It is manifest that, in the consideration of this question, the formal assignment of counsel, to secure compensation for their services, of a certain portion of the plaintiff's claim, adds nothing to their standing here. Without it, an agreement for a contingent fee to be paid out of the amount recovered would of itself have constituted an equitable assignment which the courts would recognize and enforce. *Patten v. Wilson*, 34 Pa. 297. While, on the other hand, if the attachment was effective, as supposed, to bind the money

in the hands of the garnishees from the date of service, an assignment afterwards, legal or equitable, would not retroact and overcome this advantage. Without regard to the assignment, therefore, the right of counsel to have their fees paid out of the fund depends on whether they have a lien upon it because of their services, and it is to that that the case comes down.

This is a matter of local law, and is not to be disposed of on any independent views entertained by the Federal courts. *Gregory v. Pike*, 67 Fed. 837. Turning then to the Pennsylvania decisions, no lien for counsel fees is there recognized, the right of counsel to be paid out of a fund in hand being one of deduction or defalcation only. It attaches in favor of counsel, in other words, to that which he has in his actual possession. If he has papers, he may retain them until paid for his services in the particular case to which they belong; or if he has collected money, he may deduct his fee before being compelled to turn it over. *Dubois' Appeal*, 38 Pa. 231; *McKelvy's Appeal*, 108 Pa. 618. Indeed, in *Patten v. Wilson*, 34 Pa. 279, upon which some reliance seems to be placed to support the claim for counsel fees, it is expressly declared that the attorney there had no lien on the fund attached by virtue of his professional relation, the case being ruled in his favor solely on the ground that the agreement between himself and his client amounted to an equitable assignment, and that, being prior, it was therefore superior to the attachment. In the present instance, however, the attachment is first, and so apparently entitled to priority; and while it may be that if the fund were actually in the hands of counsel, who represent the plaintiff, they would not be required to part with it without deducting their fees, yet in order to avail themselves of this privilege it would have to be in their positive control, in this way, and it is not the same, that it has been paid, as it has, into court.

But the question is set at rest beyond peradventure by the decision in *Patrick v. Bingham*, 2 Pa. Sup. Ct. 113. The fund there in controversy was part of an estate which had been conveyed in trust for the benefit of the grantor for life, with remainder over to

other parties—an arrangement, which while good as to the grantor herself was bad as to creditors, and was claimed by counsel by whose professional services it was recovered back from a party to whom it had been improperly paid by the trustee, pending litigation over it, as well as by a creditor who had attached the money in such party's hands. The fund having been paid into court was awarded to the attaching creditor. "It is true," says Smith, J., "that in equity a chancellor has power to direct the payment of reasonable counsel fees, out of moneys for distribution, when the fund is the product of the attorney's labors, and he has agreed to look to it solely for his compensation. *McKelvy's Appeal*, 108 Pa. 615.

\* \* \* But there is no warrant for the proposition that at law an attorney's claim for services, for a sum not judicially ascertained nor assented to by other claimants, is a lien upon the fund attached, as against such claimants. To hold that an attorney's fee is a lien on the money in court, because it was recovered through his services, would be to ignore the doctrine of *Dubois' Appeal*, 38 Pa. 321, the principles of which are distinctly recognized in *McKelvy's Appeal*, supra, although the cases differ materially in their facts. However desirable it may be to allow claims of counsel for services out of funds which those services secured it cannot be done in the absence of legislation permitting it, to the prejudice of other creditors who have liens upon the money."

Nor is this ruling weakened by anything which appears in *Mann v. Wakefield*, 11 Pa. Sup. Ct. 18, when the facts of that case are considered. The fund there belonged to an insolvent estate, and had been produced as the direct result of litigation instituted to have it so established. And it was under these circumstances that counsel, by whose services this was brought about, were allowed compensation out of it in preference to certain attaching creditors, who, while the litigation was in progress and before it had finally been disposed of, secured judgments and issued execution attachments, summoning the party in whose hands the moneys were as garnishee. "The evidence clearly shows," says Orady, J., "that the fund was produced largely, if not entirely, through

the professional services of the counsel named. The litigation was tedious and complicated, and was resisted until the entering of a judgment by the Supreme Court. The amount claimed (by counsel) was found by the auditor and court to be fair and reasonable. His services were instrumental in creating a fund which inured to the benefit of all, and it was proper that his claim should be paid first."

The distinction to be observed with regard to that case is manifest. The fund there was the immediate outcome of litigation prosecuted for the benefit of all parties interested, without which there would have been no fund at all for any of them. The conditions under which it was distributed were also such as to permit equitable considerations to have play. By contract, however, in the present case, as in *Patrick v. Bingaman*, supra, the parties stand strictly on their legal rights, beyond which the court is not at liberty to go. And while the money for distribution at this time was no doubt forced out of the garnishees, as the result of the verdict recovered here, yet it cannot be said, in any real sense, to have been produced or created thereby. The plaintiff's claim, which was thus made good, existed without regard to the action which was instituted upon it, however it may have been so brought to a head, all that was done by counsel being to prosecute it to a successful conclusion. But this could just as well have been done in the attachment proceedings as here, and in either instance the counsel respectively engaged would have acted therein, not for the benefit of others concerned, although possibly resulting in that, but solely in the interest and for the advantage of the client by whom he was specially employed. This does not make out a case for compensation out of a fund produced by services rendered, and the money must, therefore, go to the attaching creditors, the claim of plaintiff's counsel being denied.

Let a formal order to that effect be entered.

For plaintiff, *Harry H. Fisher*.

For defendant, *J. M. Shields*.

The right of the owner of a dog to maintain an action against one who wantonly and maliciously kills or injures it is sustained in *Columbus Railroad Co. v. Woolfolk* (Ga.) 10 L.R.A. (N.S.) 1136.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### KEIFNER v. PITTSBURGH C. C. & ST. L. RY. CO.

*Action for death of husband—Verdict for plaintiff—Judgment for defendant non obstante verdicto.*

A (widow) recovered a verdict for the death of B (husband). B, having a railroad ticket, started to cross the first track to reach the second upon which his train was approaching, and was immediately struck by a fast train upon the first track. It was broad daylight, and the view of the trackway clear and unobstructed for 500 yards. Held, that judgment should be entered for the defendant, non obstante verdicto.

No. 1026 December Term, 1902.

Opinion by BROWN, P. J. Filed April 17, 1907.

Much as we deplore the sad loss to the widow and children of John Keifner, deceased, the undisputed facts of the case and the well settled rules of law prevent a recovery of damages and require that judgment be entered for the defendant *non obstante verdicto*.

On December 3, 1901, Mr. Keifner purchased a ticket at Carnegie station for a station three miles west.

To reach the westbound track upon which his train would arrive it was necessary to cross the eastbound track—and his view along the trackway was clear and unobstructed for 500 yards.

Although the coming of his train had been announced by the ticket agent, it had not arrived, but was approaching the station when he started to cross the eastbound track upon which he was run down and killed by a train running at a high speed.

Briefly, the story of the accident appears in the testimony of eye witnesses—Miss Mack, Mr. Lee and Mr. Black.

#### MISS MACK TESTIFIES.

Q. Were you at the station at Carnegie on the morning of the third day of December, 1901?

A. Yes sir.

Q. Did you see any of this occurrence?

A. I did; part of it.

Q. State to the Court and jury just what you know?



A. There was a crowd of us there for the 7:05 train west and the bell rang—

Q. Where were you at that time?

A. In the station, and the bell rang and we started for the door.

Q. What bell do you refer to?

A. For the train west.

By the Court:

Q. Your train?

A. Yes sir, our train west. And I noticed the first man out in front of us; there was a man walking out in front of us. He was the first person out of the door, and three girls of us were next, came out in a crowd. I don't know who was first, and our train, the train west, was coming in.

Q. Just as you started off?

A. Yes sir, just as we got on the small platform of the station *our train was coming in; it was not yet in.*

Q. How close to the station was it at that time?

A. I couldn't tell you that.

Q. You could see it coming?

A. Yes sir, plainly, and at the same time there was a passenger train coming west.

Q. Could you see that?

A. Yes sir, you could see the express train.

Q. Coming?

A. Yes sir. And I didn't notice this man from he time he came out of the door until I saw him on the track in front of the express train. At the time I saw him on the track we were walking, and the time I saw him on the track the train was not more than four or five feet from him.

Q. What track was that—the eastbound?

A. Yes sir, he was standing on the eastbound track or walking across; he was on the track when I saw him.

Q. And at the time he was walking on the track how close was the eastbound train to him—just on him?

A. When I saw him the train wasn't more than four or five feet from him.

Q. When he was moving?

A. Yes sir, he was moving; that was my idea.

MR. LEE TESTIFIES.

Q. State what you saw in reference to this occurrence?

A. I was standing there and I heard the train coming on the eastbound track.

By the Court:

Q. Did you look and see it coming?

A. Yes sir.

Q. How far did you see it first?

A. I judge three or four hundred yards.

Q. How close was this train to him at the time you saw it?

A. So close I hollowed to him.

Q. Just seemed to be right on him?

A. Yes sir, right on him.

Q. *It struck him like a flash?*

A. That quick—

MR. BLACK TESTIFIES.

Q. Where was the eastbound train at the time you saw this man on the track?

A. It was a few rods off him when I first noticed it.

Q. Could you tell us about how far?

A. When I first noticed it it was about a hundred feet from him. He was just commencing to go down the track then.

By the Court:

Q. When it was about a hundred feet away he was approaching the eastbound track?

A. He was on the track.

Q. And it was coming rapidly?

A. Yes sir.

Q. *And came on him as he was on the track?*

A. Yes sir, struck him about half way on the track.

With a straight track and an unobstructed view of the train for at least 500 yards, the inference is irresistible that Mr. Keifner walked directly into a rapidly moving train and was killed.

On the facts the case is ruled by *Curroll v. Pennsylvania Railroad Company*, 12 W. N. 348, and *Irey v. Pennsylvania Railroad Company*, 132 Pa. 563. It the latter case it is said:

"The evidence shows that the deceased lost his life as the result of his own rashness. While waiting at the station to take the train or Phoenixville, under the mistaken belief that his own train was just starting, he left the platform and ran across the tracks, directly in front of a passing train, by which he was struck and killed. Had he looked he would have seen the approaching train and saved his life. It is idle to speak of the negligence of the defendant company; plaintiff's own negligence was so palpable as to justify the judge below in withdrawing the case from the jury."

Judgment is directed to be entered for the defendant *non obstante veredicto*.

For plaintiff, *Stillwagon and Dannels*.

For defendant, *Dalzell, Scott & Gordon*.

A police officer is held, in *Klein v. Pollard* (Mich.) 10 L.R.A. (N.S.) 1008, to have no authority to arrest without warrant a woman who is walking quietly along the street after emerging from a disorderly saloon at midnight.

**Court of Common Pleas No. 2,**  
**ALLEGHENY COUNTY.**

**THE PITTSBURGH COAL CO. v.**  
**ALLEGHENY NAT. BANK, et al.**

*Coal—Support of surface—Indemnifying Agreement—Covenant running with the land. Jurisdiction.*

A conveyed to B certain coal land, giving an indemnity against liability for damage to the surface. B conveyed to C, and assigned the indemnifying agreement. D, the lessee of C, was sued for damages to the surface and verdict recorded. D then sued A on the indemnifying agreement. Held, that the agreement ran in favor of D.

After entering a general appearance and demurring on other grounds, defendant cannot set up lack of jurisdiction on the ground that the cause of action being a covenant coming with the land the action should be in the county where the land lies.

No. 334 October Term, 1906. Sur demurrer to statement.

Opinion by SHAFER, J. Filed October 20, 1906.

The statement sets out that the defendants were the owners of coal lands in Westmoreland county, Pennsylvania, which lands have never been released from the burden of maintaining the surface over the coal; that the Youghioghenny Coal Company purchased these coal lands from the defendants, taking from them a conveyance thereof and an agreement under seal to indemnify the Youghioghenny Coal Company from any liability "for any damage which may result to the surface of the tracts of land overlying the aforesaid blocks of coal or others or to improvements thereon by reason of the careful and skillful mining and taking away of said coal;" that afterwards, in 1889, the Youghioghenny Coal Company agreed in writing to sell and convey to one Upson A. Andrews, and others, their nominees and assigns, all their interests in said coal lands, together with the appurtenances, and that this agreement was with the consent of the Youghioghenny Coal Company assigned by Andrews et al. to the Pennsylvania Mining Company. That the Pittsburgh Coal Company, the plaintiff herein, as the nominee,

lessee and agent of the Pennsylvania Mining Company, proceeded to mine the coal in question in a careful and skillful manner, which mining and removal caused a subsidence of the surface; that one Richard Greenawalt, the owner of the surface, brought suit against the Pittsburgh Coal Company in the Common Pleas of Westmoreland county in the year 1901, of which suit the defendants in this action refused to defend the same, but that the same was defended by the Pittsburgh Coal Company, and that the action was so proceed in that a verdict was given and judgment rendered thereon for the plaintiff, Greenawalt, against the Pittsburgh Coal Company for \$1,664.61, and that the Pittsburgh Coal Company necessarily laid out and expended in and about the defense of the action a sum which, together with the verdict, amounts to \$2,472.09; that after the mining of said coal, on November 10, 1903, the Youghioghenny Coal Company made a formal conveyance of the coal lands in question to the Pennsylvania Mining Company, and at the same time assigned to the Pennsylvania Mining Company all its rights in the agreement of indemnity above mentioned. The suit in this case was brought on August 2, 1906. On August 13, 1906, a general appearance was entered for the defendants. On September 5, 1906, a demurrer was filed to the statement above mentioned, the reasons assigned being that the covenant sued on does not run with the land, is not assignable, and was personal to the Youghioghenny Coal Company. Afterwards, on September 11, 1906, the defendants had leave to assign an additional ground of demurrer, namely, that if the covenant did run with the land, then the action was local, and could not be maintained except in the county of Westmoreland, where the land lies. Whether a covenant runs with the land or not depends largely on the circumstances. Without undertaking to determine at this time whether the covenant sued on in this case does in fact run with the land, we are of opinion that so far as the statement discloses the circumstances of its being made it appears to be a covenant running with the land, although not containing the word "assigns," because it seems to be one which was made for the benefit of whoever should

be the owner of the land at the time of the removal of the coal.

It is claimed by defendants that the action, if maintainable at all, is local, and should have been brought in Westmoreland county, where the land lies. It was admitted on the argument that the defendants did not live and could not be served in Westmoreland county. It is also admitted as matter of law that if this action had been brought by the Youghiogheny Coal Company, the original covenantee, it might be brought in any county where the defendants were found. It is claimed, however, that the present plaintiffs do not stand in privity of contract with the defendants, but must found their suit upon privity of estate, and that when that is the case the action is local, and this is said to be the case whether the action is intended to enforce a burden charged upon the land or a covenant made for the benefit of the land. It must be admitted that the law is laid down substantially to this effect in the old books. The only Pennsylvania case that has been pointed out to us is that of *Henwood v. Cheeseman*, 3 S. & R. 500, where the discussion of the matters now in question was entirely obiter, the action being assumpsit for the use and occupation of lands lying out of the state in which no such question could arise, the action of assumpsit being as is there stated always transitory. In the case of *Fennell v. Guffey*, 155 Pa. 38, the question was raised in a case where the owner of the land was endeavoring to charge the assignee of a lease made by him. The matter is disposed of by the Court saying: "If we concede the defendant's position, it was too late to take advantage of it after plea pleaded." The courts of Pennsylvania would, therefore, seem to be in a position to discard a technicality which at this day can serve no useful purpose whatever, but on the contrary must frequently produce a total denial of justice, at least in a case where the defendants are not in possession of the land and the plaintiff is in possession and is entitled to the benefit of a covenant made by the defendants. There can be no possible good accomplished by holding the action to be local to the county where the land lies. Whatever the law may be in the respect, how-

ever, we are of opinion that it is too late to set up the privilege of being sued in Westmoreland county after the entry of a general appearance followed by a demurrer on other grounds. The demurrer is therefore overruled and the defendants are allowed fifteen days after notice hereof to file an affidavit of defense.

For plaintiff, *J. O. Petty*.

For defendant, *Shiras & Dickey and John D. Brown*.

(Common Pleas No. 2, Allegheny Co.)

### WADE v. DAUDER.

*Two suits—Same cause of action—Abatement.*

While a suit was pending for rent plaintiff entered judgment on a warrant of attorney in the lease for the amount of rent claimed. On a rule to open the judgment because the first suit was pending it was decided that if plaintiff discontinued the prior suit within ten days the rule would be discharged.

The fact that one suit was pending does not of itself invalidate a second suit brought for the same cause of action.

No. 221 July Term, 1907.

Opinion by *SHAFFER, J.* Filed September 30, 1907.

A judgment was entered in this case upon warrant of attorney contained in a lease authorizing the entry of judgment for rent in arrear. The defendant has obtained a rule to show cause why the judgment should not be opened, alleging two reasons—first, that the plumbing was in such shape as to make the house uninhabitable by reason of sewer gas; and, second, that before the entry of the judgment herein a suit was brought before an alderman of the city of Pittsburgh for the rent in question, and a judgment recovered therefor, from which judgment an appeal was taken by the defendant and is still pending. As to the allegation about the condition of the building, we are of opinion that the statements of the petition do not show any valid defense to the claim for rent. The allegation of the pendency of another suit for the same debt, which is not denied by the plaintiff, furnishes a reason for staying proceedings while that suit is pending, and if the judgment were opened and the

defendant allowed to defend, a plea of the pendency of the prior suit at the time of the plea pleaded would be a good plea in abatement. It was said in the case of *Toland v. Tichenor*, 3 Rawle 320, that it is not sufficient to abate the second suit that the prior suit was pending when the second suit was brought, but that it is necessary to aver that the first suit was pending at the time of the plea, and it is further intimated as the modern view of the law that even if the first suit were still pending when it was pleaded in abatement, the plaintiff might thereafter discontinue the first suit and reply that fact. In this state of the law there would be no object in allowing the defendant to make a defense which could be so easily disposed of. If, therefore, the plaintiff will within ten days discontinue the former suit the rule herein will be discharged.

The warrant of attorney in this case authorizes the collection of an attorney's fee of \$50. As this is of course in the nature of a penalty, and the sum claimed as rent is small, we are of opinion that the attorney's fee in this case should not exceed \$10, and this we understand counsel for plaintiff to accede to.

For plaintiff, *Marron & McGirr*.

For defendant, *Joseph Fitzsimmons*.

## Court of Common Pleas,

CAMBRIA COUNTY.

### COMMONWEALTH ex rel. v. LEGEL.

#### *Habeas corpus—Costs—Discretion of court.*

In the absence of statutory provisions the court has discretionary control over the costs in habeas corpus proceedings.

No. 300 December term, 1907.

Opinion by O'CONNOR, P. J. Filed December 2, 1907.

The relator presented to the judge of this court in chambers on October 21, 1907, a petition for a writ of habeas corpus, through and by virtue of which writ she sought to obtain possession of a child which she conceived had been duly apprenticed to her by its widowed mother some fourteen months previous.

The petition was in form, the writ was awarded and made returnable November 6, 1907, at the court house in Ebensburg, where and when the parties appeared, and counsel for defendant presented and caused to be filed an answer, in which the legal right of the relator to the custody of the child was denied, in that the instrument by which relator sought to establish her legal claim was defective and invalid in law for that purpose.

Counsel for the relator submitted that the instrument by virtue of which his client claimed the right to the possession of the child was ineffective in law to sustain that claim on the ground of apprenticeship, but that, nevertheless, it was such an instrument as would warrant the court in taking cognizance of it in the way of evidence, and that authority supported the right of the court to award the custody of the child in accordance with the terms of the agreement; but added, that if the mother desired the custody of the child, and the relator was relieved from further obligation, the contention would be closed.

Counsel for respondent, however, insisted that the relator should pay the costs. This the relator was unwilling to do, and counsel agreed that the court should award the custody of the child to its mother, and should dispose of the matter of costs as to the court seemed meet, or as required by law. It was then announced by this court that the equities appeared to be in favor of the relator, and unless prevented by some enactment, or by time honored practice, that the court would impose the costs upon the respondents.

The statute governing proceedings such as those at bar is silent on the question of costs. We find that in many states throughout the Union hands of the court are tied by statutory provisions; and in those states, our own among the rest, where no provision is made for the disposition of the costs, the courts have treated that part of the order as within their discretion, much after the manner of equity jurisdiction, and have acted accordingly.

In our own court we find this practice followed in a number of cases, among which we may cite that of *Com. ex rel. Stewart v.*

*Rager*, March term, 1897, No. 55; and *Com. ex rel Wolfe v. Wolfe*, June term, 1895, No. 470; as well as in the following reported cases: *Com. ex rel. v. Ebert*, 24 Pa. C. C. R. 648; *Com. ex rel. v. Berkheimer*, 4 D. R. 712; *Com. ex rel. v. Hogan*, 14 D. R. 196; *Com. ex rel. v. Connor*, 14 D. R. 697.

The practice, we believe, fully supports the position that in the absence of statutory provisions the court has discretionary control over the costs in habeas corpus proceedings such as that now at bar; and we therefore enter the following order in accordance with our notification to counsel given upon the date of the hearing:

And now, December 2, 1907, the custody of Florence Rich, the natural daughter of Elizabeth Legel, one of the respondents, is awarded to her mother, said Elizabeth Legel; and Andrew Legel and Elizabeth Legel, into whose custody said child was taken out of the possession of the relator without process of law, are directed to pay the costs.

For petitioner, *M. D. Kittell*.

For respondent, *Percy Allen Rose*.

#### Insurance.

The Supreme Court of the United States has recently held, in *Hiscock v. Mertens*, 17 Am. B. R. 483, that where a bankrupt's life insurance policy does not in terms give the right to a cash surrender value at his option in advance of the expiration of the tontine period, but the company, in accordance with its practice, on default in the payment of premiums, upon the application of the assured, accompanied by the surrender of his policy, will pay to him a sum equal to the then cash value of a paid-up policy, his policy of insurance is within the proviso of section 70a of the Bankruptcy Act, and upon paying or securing to his trustee the cash surrender value, within thirty days after it has been ascertained, he is entitled to continue to hold the policy free from the claims of creditors.

Money received by an insolvent banker for the purchase of a draft which he knows to be worthless is held, in *Whitcomb v. Carpenter* (Iowa) 10 L.R.A.(N.S.) 928, to be held by him in trust for its owner, who is entitled to priority over general creditors.

One stopping an automobile in front of a corner store is held, in *House v. Cramer* (Iowa) 10 L.R.A.(N.S.) 655, not to be liable for the running away of a team hitched near the corner on a side street, although he permitted the explosions to continue after the machine stopped, if, after he saw that the team was frightened, he could not have stopped the noise in time to obviate the escape of the team.

Lands containing deposits of limestone, silica, silicated rock, and clay, which are valuable for the manufacture of cement, are held, in *State ex rel. Atkinson v. Evans* (Wash.) 10 L.R.A.(N.S.) 1163, to be within the constitutional provision permitting aliens to purchase lands containing valuable deposits of minerals, metals, iron, coal, and fire clay.

Appeal, and not petition to review, is held, in *Mason v. Wolkowich* (C.C.A. 1st C.) 10 L.R.A.(N.S.) 765, to be the proper method of reviewing proceedings in a bankruptcy court which involve a controversy such as a demand by the trustee that proceeds of a sale made by a receiver be paid to him rather than a mere proceeding in bankruptcy.

An innocent holder for value is held, in *Arnd v. Sjoblom* (Wis.) 10 L.R.A.(N.S.) 842, to be entitled to enforce a note given for lightning rods, notwithstanding it does not bear upon its face a declaration of that fact, as required by statute, which renders it invalid as between the parties to it.

An agreement without consideration, to fix the division line between two adjoining property owners at a place which is known by both parties not to be the true line, is held, in *Lewis v. Ogram* (Cal.) 10 L.R.A.(N.S.) 610, to be without effect.

The mere fact that a passenger train runs into an open switch and collides with cars standing thereon is held, in *Southern R. Co. v. Lee* (Ky.) 10 L.R.A.(N.S.) 837, not to raise, in favor of an injured passenger, a presumption of gross negligence, which, without evidence, will entitle him to punitive damages.

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No. 29.

PITTSBURGH, PA., JANUARY 29, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### PITTSBURGH COAL CO. v. THE UNION TRUST CO.

*Corporations—Stock—Owned by the corporation—Trusts—Authority of officers.*

A corporation was formed for the purpose of taking over various coal properties, being paid for by delivering stock in the new company. One property was subject to a mortgage, and instead of paying it off the new company issued its written guaranty of payment, which was filed with the trustee of the mortgage. The stock which would otherwise have been issued for this property was held and receipts issued therefor as belonging to the new company to protect it against the mortgage in question, the trustee being of the same company as the trustee of the mortgage. Held, there was nothing in the transaction to show the stock not held to secure performance of the guaranty, and being held in a dry trust should be turned over to the corporation.

The fact that the attorney for the corporation, and also the treasurer, signed papers indicating that the stock was held to secure payment of the mortgage would not bind the corporation, it not being shown that their acts were authorized or approved by the directors.

No. 903 October Term, 1906.

Opinion by SHAFER, J. Filed December 14, 1907.

The bill is for the cancellation of certain certificates and an order for the transfer to the complainant of certain of its own shares now held by the respondent as trustee for the complainant.

#### FINDINGS OF FACT.

1. The complainant is a corporation of New Jersey, having an office in the city of Pittsburgh, and the defendant is a corporation under the laws of this commonwealth.

2. The complainant company was organized in 1899 in substantially the following

manner: It issued to a firm called Moore & Schley (in this transaction called the syndicate) \$32,000,000 of preferred and \$32,000,000 of common stock, which was to be used by the syndicate in purchasing certain railroad and coal properties for the Coal Company. The respondent company was employed as the agent of each of the parties, the stock being transferred by the syndicate to it to be used in the purchase of the various properties which were to be acquired by the coal company, a part of the transaction being for cash instead of stock. A schedule or statement, a copy of which is in evidence as Exhibit 11, entitled "Vendor's Settlements," was prepared showing the prices of the various properties to be purchased and the amounts to be paid in cash and in stock.

3. One of the properties which was to be thus acquired by the complainant company was that of the Northwestern Railway Company, the contract with that company providing that all its property, real and personal, and its franchises should be delivered free of debt to the complainant company. This property and these franchises were subject to a mortgage upon which there was outstanding \$794,000, and the original agreement was that this indebtedness was to be paid as part of the purchase money, the whole of which was \$1,500,000.

4. Thereafter and before the closing of the transaction it was agreed between the complainant company and those representing or owning the coal railway company that the best way of transferring the property of the railway company to the complainant was to obtain a transfer of the certificates of stock of the railway company to the complainant and to have the complainant company assume and guarantee the bonded indebtedness of the railway company instead of paying off the same as originally agreed. In October, 1899, a resolution was accordingly passed by the directors of the complainant company reciting the agreement with the Northwestern Coal Railway Company and the proposal to transfer the stock and the willingness of the stockholders of the railway company, who were also largely the holders of the bonds secured by mortgage, to transfer their certificates provided the mortgage should be assumed and its pay-

ment guaranteed by the complainant company, and authorizing the president and secretary to execute a contract of guaranty of the mortgage, and providing for a deposit of such guaranty with the trustees named in the mortgage. Such a contract of guaranty was thereupon duly executed by the officers of the complainant company as directed by the resolution, and delivered to the railway company, and the coal company thereupon was relieved from its agreement to pay off at once the mortgage on the railway company's property, and the railway company was relieved from its agreement to turn over its property free from liens.

5. The purchase of this railway company is entered in the schedule, Exhibit 11 above mentioned, as Item No. 63, showing the price to be \$1,500,000, the cash payment to be \$347,537.71, the payment in preferred stock to be \$349,800, and under the heading of preferred stock retained \$561,863.29, the amount, \$802,662.29, being \$794,000 with accrued interest on the bonds of that amount. The items in this schedule under the heading of cash and stocks retained represented the amounts which the trust company was thereby directed not to hand over to the vendors, but to retain as against them for the benefit of the complainant company to secure it against liens or claims which might be still unpaid against the properties of the vendors.

6. The respondent trust company thereupon proceeded to make the cash payments indicated in this schedule and to turn over the stocks therein indicated to the different vendors, giving to the vendors "non-negotiable vendor's receipts" showing the amount of cash or stock retained to pay off liens on real estate purchased, and before the first of January, as we understand the testimony, the transaction of forming the company was so far completed that all the items set out in schedule, Exhibit No. 11, were closed up and the properties turned over to the proper parties, except the preferred and common stock indicated in Item 63 to be retained, and this stock was not delivered to the railway company but was retained by the trust company for the reason that the guaranty of the railway company's mortgage by the complainant company took the place of the

payment of that amount of the purchase money.

7. The matter remained in this situation until January, 1900, when the complainant company declared a dividend. Upon some negotiations between the parties as to what should be done with this dividend on the stock in question in this case, and how it could be paid to anyone without the issue of a certificate, the trust company on January 24, 1900, issued, first, a non-negotiable vendor's receipt in the form which had been used with all the other purchasers, stating that there were deposited with it the shares in question in this case which will be payable "to The Union Trust Company of Pittsburgh, trustee for Pittsburgh Coal Company," on the satisfaction of all the liens against the real estate of the railway company, and on the same day issued interim certificates which certify that The Union Trust Company of Pittsburgh, trustee for the Pittsburgh Coal Company, is entitled to the shares above mentioned. On January 30, 1900, Mr. A. M. Neeper, who was the attorney for the complainant company, addressed a letter to the trust company requesting them to pay to the treasurer of the complainant company the amount of the dividend on the stock in question, describing it as stock held "by you as trustee to redeem and pay interest upon \$794,000 of the first mortgage bonds of the Northwestern Coal Railway Company," and stating that the matter of the final formulation of the terms of the trust with reference to this stock was still in abeyance, and thereupon, on the same day, the treasurer of the complainant company receipted to the trust company for this dividend, stating it to be "the amount of stock held in trust for the redemption of the principal and interest of \$794,000 of the first mortgage bonds of the Northwestern Coal Railway Company." The later dividends have been paid to the Pittsburgh Coal Company in the same manner.

8. At some time apparently after the payment of the first dividend the directors of the complainant company passed a resolution, printed as Exhibit D of the bill, directing and authorizing the Union Trust Company to purchase for account of the coal company \$ of the preferred stock, to

be held by the trust company for the use and benefit of the coal company to pay the principal and interest of the bonds of the Northwestern Coal Railway Company, subject to the right of the coal company to sell or otherwise dispose of the stock so that the proceeds shall be available for the payment of the bonds. A form of trust agreement in accordance with this resolution was presented to the trust company for execution, but the respondent company declined to accept the trust upon the terms therein mentioned. The complainant company thereupon demanded of the trust company a transfer and delivery to it of the stock in question represented in the interim certificates above mentioned. This demand was refused by the respondent upon the allegation that the stock in question was deposited with it as a trustee to further assure the payment of the principal and interest of the bonds of the Coal Railway Company. The respondent states in its answer that it has no interest whatever in the matter, nor any desire to retain the stock beyond the discharge of such duties as are imposed upon it by the course of the transactions above set forth.

9. The respondent company contends that these shares were made a trust for the payment of the railway company's mortgage by the non-negotiable receipt above mentioned, it showing that the shares were deposited and would be payable to The Union Trust Company as trustee upon the satisfaction of record of all liens against the real estate conveyed by the railway company. It is very evident that these receipts were given merely for the purpose of assuring the vendor in each case that the trust company held cash or stock for it which would be delivered over upon the satisfaction of liens. If this transaction had been carried out according to the original intention as shown by the schedule, the vendor's receipts would have been given not to the trust company in trust for the coal company but to the railway company, which was the vendor. The Pittsburgh Coal Company was the owner of the shares, and this is indicated by the receipt. It is true the shares had been turned over to the syndicate, but only for the purpose of paying for the various properties to be bought. As the railway company's

property was already paid for, the syndicate could have no interest in the shares, and it held them, if at all, for the coal company, which had paid by its guaranty the purchase money which it was originally intended should be paid for with the stock. We, therefore, find that there is nothing in this non-negotiable receipt which impresses the stock with any trust.

10. The only facts which would indicate the existence of a trust for the holders of the mortgage against the railway company are the facts above stated, that Mr. Neeper stated in a letter to the trust company that the stock was held by it as trustee to redeem the mortgage, and that the treasurer of the coal company stated the same thing in his receipt for the dividends, and the resolution, Exhibit D of the bill, which proposed to put bonds into the hands of the Union Trust Company in trust to pay the principal and interest of the mortgage. There is nothing to show that either Mr. Neeper or the treasurer had any authority from the company to devote this stock to any particular purpose. It seems to us that the resolution, Exhibit D, which was never acted upon, cannot be said to have impressed the shares in question with any trust. It is at most a proposition to do so for the benefit of the coal company itself; even if the stock referred to in that resolution is the same as the stock in question, which may be doubtful. There is no evidence that the coal company ever did anything which would put the stock in question under a trust for the holders of the railway mortgage. We find, therefore, that the Union Trust Company holds this stock upon a dry trust for the Pittsburgh Coal Company.

#### CONCLUSIONS OF LAW.

1. It is contended by the counsel for the respondent company that because Moore & Schley, or their agent, left the certificates with the trust company they should be parties to this bill. Having found, however, that the stock was turned over to Moore & Schley, known as the syndicate, merely for the purpose of paying for these properties, and the property was otherwise paid for, there remains no kind of title or interest whatever in Moore & Schley, and we see no



reason why they should be made parties to the bill.

2. It was not claimed by the respondent company on argument or in the brief furnished to us that the holders of the mortgage should be made parties, although an amendment to the bill was allowed to be filed, setting up that they were necessary parties. We have found as matter of fact that there never was any trust created for the mortgages, and we are of opinion that if the respondent company deems itself to be a trustee or in danger of being held to be a trustee for the mortgagees or syndicate, or anyone else connected with the transaction, it would be amply protected by giving notice to such persons of the claim made against it and to appear and defend, and that it is not necessary for the plaintiff to anticipate any such claims on behalf of strangers.

3. We are of opinion, therefore, that the shares of stock in question are the property of the complainant company and not subject to any trust; that although the legal title to such shares is in The Union Trust Company in trust for the complainant company, the trust is a dry one, and that the complainant company is entitled upon demand to have the shares in question transferred and delivered to it by certificates made out to it in its own name.

It must therefore be adjudged and decreed that the 7,940 shares of preferred stock and the 5,558 shares of common stock, described in the bill, are the property of the complainant company, and it is ordered and directed that the respondent company transfer and deliver the same to the complainant company upon demand. It is further ordered that the complainant pay the costs.

For plaintiff, *Charles M. Johnston and A. M. Neeper.*

For defendant, *Reed, Smith, Shaw & Beal.*

(Common Pleas No. 2, Allegheny Co.)

### PITTSBURGH COAL CO. v. THE UNION TRUST CO.

*Mortgage—Sinking fund—Coal Mined.  
Construction.*

The A company gave its mortgage on all its property, the real estate being described by reference

to the deeds; the list did not include two leases which were non-assignable, and they were specially excluded. The mortgage contained a sinking fund provision of five cents per ton of coal mined out of the mortgaged premises. It also provided that the term mortgaged premises should include coal owned, leased or operated, but not coal owned by subsidiary companies, whose stock was pledged under the mortgage.

Held, that no sinking fund was required to be paid on the two leases excepted from the mortgage. The clause defining mortgaged premises was for the purpose of excluding the sinking fund from applying to certain properties and did not change the tenor of the mortgage by including the two leases excluded from the mortgage in the sinking fund provision.

A having paid part of the sinking fund on the two leases, with knowledge of the facts, could not require it to be paid back out of the sinking fund or divert it from the terms of the original payment.

No. 927 October Term, 1906.

Opinion by SHAFER, J. Filed December 14, 1907.

The bill is by a mortgagor against the mortgagee for the interpretation of clauses in the mortgage; for an injunction to restrain the mortgagee from declaring a forfeiture for non-payment of certain moneys claimed by it to be due upon the clauses in question, and for an order that moneys heretofore paid to the mortgagee under these clauses be otherwise credited.

#### FINDINGS OF FACT.

1. The complainant company is a corporation of Pennsylvania, and is and was at the time of making the mortgage in question the owner of a large number of coal mines, in some of which it owned a fee, in others a leasehold interest on leases made to the complainant company, or made to others and assigned to it, and was and is also the owner of stock of other coal companies engaged in mining coal.

2. The respondent is a trust company organized under the laws of Pennsylvania, engaged, among other things, in the business of loaning money upon mortgages.

3. In the year 1903 negotiations were entered into between these two companies for a loan of \$25,000,000, to be made by the respondent company to the complainant, upon bonds to be issued by the complainant

company, to be secured by a mortgage of all its property, and an agreement was duly entered into between the parties to that effect. This agreement contained a provision that a sinking fund should be created by the payment of five cents a ton on the coal mined.

4. The trust company thereupon proceeded to examine the title of the coal company to the various lands and properties belonging to it, and in the course of this examination it was observed by counsel for both parties that two certain leases of coal lands, one made by the Shaw Coal Company and another by the Midland Coal Company, to the respondent, contained clauses forbidding the lessee to assign the lease on pain of forfeiture.

5. A mortgage was thereupon drawn up and executed, dated January 1, 1903, and delivered sometime later, which conveyed all the property, real and personal, then owned or thereafter to be acquired, wherever situated, belonging to the complainant company, the lands being described by a reference to the place of record of the deeds. This list did not show either the Shaw Coal Company lease or the Midland Coal Company lease; following the list, however, is a provision that nothing in the mortgage contained shall be construed to convey, mortgage or encumber the rights acquired by the coal company by either of these leases, "neither of which properties is described herein."

6. The mortgage contains a clause providing for a sinking fund, requiring the mortgagor to pay each year to the trust company five cents a ton for each ton of coal mined out of the mortgaged premises during the year, the fund so produced to be used in the payment of the bonds as they became due, or in purchase of them on the market under certain provisions. At the end of the articles in regard to the sinking fund appears the following provision: "The term 'mortgaged premises' as used in sections 1 and 2 of this article includes coal owned, leased or operated by the coal company, but does not include coal owned by other companies whose capital stock in whole or in part may be owned by the coal company and pledged hereunder."

7. In reporting the amounts of coal

mined the complainant company did not for the first two years of the existence of the mortgage report any coal mined by them on either the Shaw or the Midland leases, and no money was paid under the sinking fund clause on the coal so mined. About two years after the making of the mortgage the trust company demanded reports and payments on the coal mined in these two leases, claiming that the same was included in the sinking fund clause of the mortgage, and this claim was disputed by the coal company. After some conference between the counsel of the parties, it was suggested that the opinion of Judge James H. Reed of Pittsburgh should be taken, and after some informal conferences with him, Judge Reed gave a written opinion to the effect that these leases were included in the sinking fund clause. It was distinctly agreed, however, upon the trial that no submission of the question had been made to Judge Reed by the parties or for them, and that his opinion was merely advisory.

8. The coal company, thereupon, still protesting that it was not bound to do so, paid for some two or three years the five cents a ton upon the coal mined in the Shaw and Midland leases, the sum so paid amounting to \$77,121.65. This money was paid under some kind of protest, but the exact nature of it does not appear. In 1906 the coal company declined to pay into the sinking fund on coal mined in these two leases, and thereupon filed this bill.

#### CONCLUSIONS OF LAW.

1. Although evidence was given tending to show the negotiation between the parties, and that it was the idea of the trust company that these leases were to be included in the sinking fund, it was not suggested that the mortgage ought to be reformed in that respect, nor was evidence taken in view of such a reformation, nor would the evidence as taken justify it. We deem ourselves called upon, therefore, to interpret the mortgage as it stands.

2. The respondent contends that the provision in the mortgage that the term "mortgaged premises" in the sinking fund clause includes "coal owned, leased or operated by the coal company," is sufficient to include the Shaw and Midland leases, although they

are expressly not mortgaged. If it was the intention of the parties to require payments upon coal not mortgaged we cannot conceive of a more ineffectual way to carry out that intention. The sinking fund clause having required payments upon all coal mined on the mortgaged premises, and the mortgage having been made to include coal operated by the company itself and the capital stock of other companies also engaged in mining coal, it was apparent that it might become a question whether the coal mined by companies whose stock was owned by the complainant company was or was not to be paid for under the terms of the sinking fund clause, and for that reason the clause in question was inserted as an interpretation of the words "mortgaged premises" in the sinking fund clause so as to exclude from the meaning of those words coal mined by the subsidiary companies. The same result would have been obtained by providing that the term "mortgaged premises" should include only coal mined, etc., or by merely saying that the term should not include coal owned by other companies, but the draftsman undertook to express the same thing both negatively and positively. We see no justification for inserting the word "all" before the words "coal owned, leased or operated," as respondent desires to do, especially when the result would be to bring to some extent within the operation of the mortgage properties which are expressly said not to be described in it, and even if the word "all" were so inserted, we would be of opinion that that would not make any part of the mortgage apply to the properties not described in the mortgage, but would simply mean that of the coal properties in any way covered by the mortgage, all those owned, leased or operated by the coal company should pay into the sinking fund, but not those owned by subsidiary companies.

3. We are therefore of the opinion that the complainant company is not bound by the terms of the mortgage to make any payments to the trust company for coal mined from the Shaw or Midland leases.

4. Part of the relief claimed by the coal company is that the trust company should be directed to credit the sums already paid on account of these leases upon coal mined

or to be mined from the mortgaged premises. The payments to the sinking fund provided by the mortgage are substantially payments on account of the mortgage. The coal company made the payments not under any mistake either of law or fact, but upon a claim by the mortgagee that they were owing to it. The complainant is therefore not entitled to recover them back, nor is it entitled to what is in effect the same thing, to have credit on other moneys which it does or may own. We are of opinion, therefore, that the complainant company is not entitled to relief in this respect.

Let a decree be drawn enjoining and restraining the respondent company from declaring the complainant to be in default under the terms of the mortgage by reason of its non-payment of five cents per ton on the coal heretofore mined or hereafter to be mined from the Shaw and Midland leases or either of them, and that each party pay one-half of the costs.

For plaintiff, *C. A. Johnston and A. M. Neeper.*

For defendant, *Reed, Smith, Shaw & Beal.*

(Common Pleas No. 2, Allegheny Co.)

**GEORGE H. SOFFEL CO. v. D. O. JONES, Owner, etc.**

*Mechanic's lien—Statement of lien—Quantity of materials.*

Where plaintiff, a plumber, furnished both labor and materials, and in his lien sets forth the nature of the work and the kind of materials furnished, it is not necessary for him to state the exact quantity of the kind of material furnished.

No. 36 January Term, 1907.

Sur rule to show cause why lien should not be stricken from the record.

Opinion by FRAZER, P. J. Filed September 18, 1907.

This lien was filed to secure a balance due on a contract for plumbing and gas fitting done in and about defendant's residence. But one reason is assigned for striking the lien from the record, as follows:

"The said lien or claim does not set forth or show the amount of materials furnished, as required by the acts of assembly relating to mechanics' liens."

The fifth paragraph of the claim is as follows:

"The kind and character of the labor furnished is the skilled labor of plumbers and gas fitters and the labor necessary in plumbing, gas fitting, laying sewers and installing the necessary fixtures in the structure aforesaid, and the kind and character of materials furnished was terra cotta, lead, galvanized iron and black iron pipes, plumbing and gas fixtures, water heater, soil pipe and the necessary fittings, such as taps, ells and tees."

The sole question, therefore, is whether the paragraph quoted is sufficiently definite to be a compliance with the act of assembly. Among other requirements the second clause of section 11 of the act of April 17, 1905, P. L. 174, requires the claimant to include in his lien "the amount or sum claimed to be due and the nature or kind of the work done or the kind and amount of materials furnished or both, and the time when the materials were furnished or the work done or both, as the case may be." This is not a case where materials alone were furnished. It is a case where both work and material were necessary and were furnished in completing a contract for plumbing and gas fitting in the house against which the lien is filed. It would be impossible to set out in detail each particular piece of lead or iron pipe used and its value and the date when each was placed in the house, or the exact days when labor was done in and about the contract. The lien set forth the time at which the first and last work was done, and also shows that all work was done and material furnished between those dates, and it also sets forth "the nature or kind of work done." As we read the act, this is a compliance with its terms, especially under the circumstances of this case.

The rule to strike off is refused.

For plaintiff, *Herman E. Soffel*.

For defendant, *Williams & Edwards*.

A railroad company is held, in *Bergstrom v. Chicago, R. I. & P. R. Co.* (Iowa) 10 L. R.A. (N.S.) 1119, to be bound by the acts of its baggageman in receiving as baggage articles not strictly such, where the owner has no notice of any limitation upon his authority.

## Court of Common Pleas,

WASHINGTON COUNTY.

### TOWNSHIP OF INDEPENDENCE v. J. V. DODDS.

*Road Tax—Taxable—Act of April 12, 1905,  
P. L. 142, Section 2.*

A, a non-resident but a land owner of a township, refused to pay \$1.00 in addition to the millage tax provided under act of April 12, P. L. 142, a tax lien was filed, and on motion for judgment for want of a sufficient affidavit of defense rule dismissed.

No. 68 February Term, 1908.

Motion for judgment for want of sufficient affidavit of defense.

Opinion by TAYLOR, J. Filed January 16, 1908.

The proviso of the second section of the act of April the 12th, 1905, P. L. 142, is the only portion of said act involved in this motion, and turns upon the meaning therein to be given the word "taxable."

The defendant, J. V. Dodds, is the superintendent of the County Home and has resided at the County Home in Chartiers township since April the 1st, 1904, and before accepting said position he was and had been for many years a resident of Independence township, but he has not been a resident of Independence township since April the 1st, 1904, although he owns considerable real estate therein. The said J. V. Dodds therefore is a non-resident of said township of Independence and in our opinion he is not a taxable of said township, and the road supervisors thereof have no jurisdiction or authority to assess upon him the sum of one dollar in addition to the millage tax provided under the act of April 12, 1905, P. L. 142, much less to assess upon him as a taxable of said township the sum of \$2 because he happens to be the owner of two separate tracts in said township.

On principle and from the authorities on the point we are clearly of the opinion that the contention in this case is with the defendant, and were of that opinion at the argument of the case, because the tax levied against said defendant is a resident personal tax and he being a non-resident is not liable therefore.

Counsel for defendant have taken pains to furnish us with a certified copy of a similar "case stated" from the county of Erie, and a decision of the question by Judge Walling, in *Millcreek Township v. S. H. Willis*, in the Court of Common Pleas of Erie county, at No. 36 September Term, 1906, which is as follows:

"Per Curiam:

"The defendant, S. H. Willis, resides in Erie City and owns a farm in Millcreek township. He has paid the tax levied upon his property, but declines to pay the further tax of one dollar levied upon him by the plaintiff under a provision in Section 2nd of the act of April 12, 1905, relating to the levy and collection of road taxes, etc., in townships, which provision is as follows, namely:

"That upon every taxable the road supervisor of each township shall assess the sum of one dollar in addition to a millage tax above mentioned."

"The question presented by the Case Stated is, does that provision apply to a non-resident who owns property in the township? In our opinion it does not. It is not levied upon property but against the person in the nature of a poll tax. The taxing power of a township cannot be extended so as to embrace a personal tax against a non-resident. A personal tax can be levied only at the place of residence.

"For the right to levy a poll tax depends on residence. 27 A. & E. Enc. of Law, 2nd Ed., page 634.

"A person is not liable for a poll tax in more than one place, and that is the place of his residence. *Preston v. Boston*, 12 Pickering, 7."

This being the only question raised in the case, from the foregoing it follows that the rule for judgment for want of sufficient affidavit must be dismissed at the costs of the plaintiff.

For plaintiff, *Underwood & Meloy*.

For defendant, *McIlvain & Clark*.

(Common Pleas, Crawford County.)

#### HALL v. HOMAN.

*Justice of the peace—Record—Amendment of record.*

The court of common pleas has no authority to permit an amendment of a record of a justice of the peace after the record has been actually removed

from the court, where there is any doubt as to the propriety of the amendment. To permit such an amendment is a dangerous practice, easily susceptible of abuse.

A transcript stating that "after hearing evidence on the part of plaintiff, judgment for plaintiff" is sufficient.

No. 43 February Term, 1907.

Certiorari and rule to amend record.

Opinion by THOMAS, P. J. Filed June 10, 1907.

Much contention was had upon argument over the right to amend the record, or to substitute a new return to the writ of certiorari, so as to make the return correspond with the record of the justice, as amended by him subsequently to the former return, but in accordance with the facts.

There is no doubt that a justice may correct his record so as to make it show the actual facts of the case at any time before the same has been removed to a higher court, and even after he has given a transcript thereof to one of the parties (*Moore v. Messersmith*, 12 Pa. C. C. 575); and he can amend a transcript or return made to court, so as to make it correspond with his docket as it actually appeared at the time of making the transcript, or return which, through mistake, contains an error. *Justice v. Meeker*, 30, Pa. Super. Ct. 207.

The question as to our right to permit the amendment is not so certain. We are referred to several cases as authority that we cannot permit the same.

In the case of *Ridgway v. Fairholme*, 3 N. J. 464, it is held a justice may amend his record so as to correspond with the truth, even after a writ of certiorari had been served on him.

It would appear from the foregoing that there is a clear difference of view with reference to such amendments, and while a court possibly has the power to amend the same, yet we recognize it as a dangerous practice, easily susceptible of abuse, and as, in our opinion, the original record is sufficient to sustain the judgment, the rule is discharged.

The exceptions are dismissed and the judgment is affirmed.

For plaintiff, *J. P. Collier*.

For defendant, *John A. Northam*.

[From J. D. Roberts, Esq., Meadville, Pa.]

# Pittsburgh Legal Journal

ESTABLISHED 1853.

EDWARD B. VAILL, } EDITORS  
THOMAS EWING, }N. S. Vol. XXXVII. }  
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No. 30.

PITTSBURGH, PA., FEBRUARY 5, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### P. C. C. & ST. L. RAILWAY CO. v. BOROUGH OF CRAFTON

*Railroad—Grade crossing in borough—Limitation speed—Ordinance—Injunction.*

There is nothing in the borough law of 1851 or its supplements which authorizes a borough of this commonwealth to limit by ordinance the speed of trains of a railroad passing through the borough at the grade crossings of the borough streets. When borough officials, therefore, seek to enforce such an ordinance by arresting the engineer of a train crossing the borough streets at a greater speed than that named in the ordinance, and threaten future arrests in case of its continued violation, they will be enjoined at the instance of the railroad.

No. 515 April Term, 1907.

Opinion by SHAFER, J. Filed December 2, 1907.

The bill is for an injunction to restrain the respondent borough from arresting or prosecuting plaintiff's employes in charge of its trains passing through the borough, under the terms of an ordinance limiting the speed of such trains over crossings therein.

#### FINDINGS OF FACT.

1. The complainant is a railway company under the laws of the state, operating a railway from Pittsburgh west through the borough of Crafton, and thence through the states of Ohio, West Virginia, Indiana and Illinois. The respondent is a borough in the county of Allegheny, organized under the general borough laws.

2. Within the limits of the borough of Crafton there are two grade crossings of borough streets, about 450 feet apart. At one of these crossings the railroad kept, and still keeps, a watchman both day and night,

and at the other a watchman in the day time only.

In November, 1906, the borough council of the respondent borough enacted an ordinance, which is printed as Exhibit A of the bill, entitled "An ordinance regulating the speed of locomotives and railroad trains within the limits of the borough of Crafton, and prohibiting the blocking or obstruction of crossings at highways in the said borough by locomotives or cars." The ordinance forbids the running of any locomotive or railroad train over any crossing in the borough at a greater speed than four miles an hour, and provides a penalty for doing so.

4. By virtue of this ordinance, the authorities of the borough in February, 1907, caused one of the plaintiff's engineers, who is daily engaged in operating a locomotive between Pittsburgh and Wheeling, W. Va., to be arrested on a charge of exceeding the speed limit of four miles an hour in crossing one or both of these crossings, and it was admitted on the trial, for the purposes of this case, that he had in fact exceeded that limit. The borough has threatened to cause the arrest of other enginemen and employes of complainant in the same manner if the speed limit fixed by the ordinance is exceeded by them. Evidence was given tending to show the grade of the railroad at these crossings, the number of trains which pass over them daily, the number of boroughs through which the trains of the complainant company pass in going from Pittsburgh to the county line, and the crowded condition of complainant's railroad, but by reason of the agreement of the parties on the trial as to the legal questions upon which the case was to be determined, we deem it unnecessary to decide what the facts are in these respects.

#### CONCLUSION OF LAW.

1. It was agreed by counsel on the argument that no question should be made of the necessity or reasonableness of the ordinance under the particular circumstances of this case, but that the only question on which the case should be determined should be whether or not the borough has power to enact an ordinance requiring a railroad company to approach the grade crossings in the borough at any defined rate of speed, with-

out regard to the question of reasonableness or necessity.

2. It is a fundamental rule of municipal law that a municipal corporation can do only that which it is expressly or impliedly authorized to do by its charter. It is admitted that in this case there is no express grant of power to make the ordinance in question. Such power is expressly granted to cities of the third class by the act of May 23, 1889, P. L. 289, and to cities of the second class by the act of March 22, 1901.

3. It is claimed, however, that the power is to be implied from the language of the borough law of 1851, which authorizes the borough to make such ordinances as they shall deem necessary "for the good order and government of the borough," and the power to regulate roads, streets, etc. As to the power to make ordinances for the good order and government of the borough, it is held in the *Pennsylvania Railroad Company's case*, 213 Pa. St. 373, that whatever the clause has been or may be held to mean, it does not empower the borough to regulate the speed of trains across its streets. It seems to us equally plain that the section of the act which speaks of the regulation of roads and streets does not mean a regulation of the speed of trains crossing them. The fact that the legislature has expressly conferred the power of regulating the speed of railroad trains over crossings in cities, but has omitted that power from the acts organizing boroughs, indicates that it was not the intention of the legislature to confer that power by implication upon the less important municipality which it was careful to expressly grant to those of a higher class.

4. We are of opinion, however, that the present case is ruled by the *Pennsylvania Railroad Company's case* above cited. In that case it is true that the ordinance in question undertook to require the railroad to erect safety gates at a certain crossing, and that the present ordinance is, in form at least, negative instead of positive, requiring the railroad to refrain from crossing the street except in a certain way, instead of a positive requirement to erect a particular device at the crossing. We cannot see, however, that there is any difference in principle. In either case the borough is under-

taking to direct the railroad company how to manage its road in a particular respect, and the cutting down of the speed of trains to that limit which the borough authorities may from time to time deem proper might well be a much more serious interference with the successful operation of the road than the erection of safety gates. The maintenance of a flagman or safety gate might impose a certain expense on the railroad, but would not probably otherwise interfere with its operation. The cutting down of the speed of trains might in some circumstances greatly obstruct the operation of the road itself. It seems to us that the present ordinance assumes "to declare how the railroad shall perform a public duty at a particular point, and would substitute its judgment for that of the board of directors as to what kind of protection shall be afforded at the grade crossing." It is of course to be conceded that the legislature might have authorized the borough to make ordinances regulating grade crossings, but we are convinced that it has not done so. We have no doubt that the ordinance in question was passed in good faith by the council of the borough with the honest purpose of endeavoring to lessen the danger to the lives of persons using the streets at these crossings, but we think it not improper to suggest to them that the only effective regulation of a grade crossing in a populous neighborhood is its abolition, and that they would do well to take whatever measures the law provides to that end.

Let an injunction issue enjoining and restraining the defendant borough, its officers and agents, from forcing or attempting to enforce the ordinance in the bill described, or from arresting any of the employes of the complainant company for breaches thereof, so far as the said ordinance forbids the crossing of any public street at a greater speed than four miles per hour, and it is ordered that the defendant pay the costs.

After a careful re-examination of the question involved, which is one by no means free from doubt, we are not convinced that any error was committed in the conclusions of law already filed, and the exceptions must therefore be dismissed.

Counsel have pointed out to the Court what appears to be a mistaken situation in the third conclusion of law, where the Pennsylvania Railroad Company's case, 213 Pa. St. 373, is referred to as furnishing an interpretation of the "good order and government" clause of the borough law. The case which it was intended to refer to was that of the Borough of Millerstown v. Bell, 123 Pa. St. 151.

For plaintiff, *Dalzell, Fisher & Hawkins.*  
For defendant, *John O. Petty.*

(Common Pleas No. 2, Allegheny Co.)

**W. L. FERNANDEZ and N. E. FERNANDEZ, his wife v. N. E. FERNANDEZ, Trustee.**

*Real Estate—Deed—Mistake—Order of cancellation.*

Plaintiff with her own money purchased certain real estate. At the time of the purchase it was suggested that the deed be made to her as trustee for her minor daughter which was done, but the deed was never delivered. At the suggestion of the mortgagee, however, the deed was made to her without the trust and recorded. Subsequently by accident or mistake, and without plaintiff's knowledge or consent, the deed to her as trustee was recorded. Held, that plaintiff was entitled to a decree declaring the deed to her as trustee null and void and an order made for its cancellation.

No. 1223 January Term, 1907. Bill in Equity.

Opinion by SHAFER, J. Filed November 25, 1907.

#### FINDINGS OF FACT.

1. John L. Gass and Tillie L. Gass, his wife, by deed dated February 16, 1903, acknowledged February 20, 1903, registered in the County Commissioner's Office for the county of Allegheny, March 7, 1903, and recorded in the office of the Recorder of Deeds of Allegheny county on the 15th day of October, 1906, in Deed Book, vol. 1491, page 203, conveyed to Nettie E. Fernandez, plaintiff in this case, two certain lots of ground in the borough of Avalon, being lots Nos. 1 and 2 in Leonard Delp's plan of lots, known as Avalon Place, recorded in Plan

Book, vol. 11, page 16, together bounded and described as follows:

Beginning at the northeast corner of Ohio Street Extension and California avenue; thence along the line of California avenue northwesterly, twenty and sixty-nine one-hundredths (20.69) feet to a point; thence continuing along the line of said avenue north forty degrees (40°) forty-five minutes (45') west, ninety (90) feet to the dividing line between lots Nos. 2 and 3 in said plan; thence northwardly along said dividing line one hundred six and seventy-eight one-hundredths (106.78) feet to Ohio Street Extension, and thence southwardly along said Ohio Street Extension one hundred fifty-two and eleven one-hundredths (152.11) feet to California avenue at the place of beginning.

2. That the consideration money mentioned in said deed, namely, \$5,000, was paid by Nettie E. Fernandez, plaintiff, to John L. Gass, \$4,500 in cash and the balance of \$500 was secured by a bond and mortgage of the plaintiff in favor of John L. Gass, dated March 7, 1903, upon the above described premises, which said mortgage was recorded March 7, 1903, in Mortgage Book, vol. 1048, page 605, and was subsequently paid by plaintiffs.

3. That said Nettie E. Fernandez borrowed from The Dollar Savings Bank of Pittsburgh the sum of \$3,500 with which to pay John L. Gass on account of said purchase money; said mortgage was dated the 24th day of February, 1903, and recorded February 24, 1903, in Mortgage Book, vol. 1064, page 587, and said loan was made on the faith of the delivery of the deed described in paragraph 1 hereof.

4. At the time the plaintiff agreed to purchase said premises it was suggested to her that the deed be made to her in trust for her minor child, Gladys E. Fernandez, and a deed therefor was drawn by Edward G. Hartje, who was attorney for John L. Gass, and executed by the said John L. Gass and his wife to Nettie E. Fernandez in trust for Gladys E. Fernandez, but said deed was never delivered to plaintiff; the plaintiff never had possession of the same and said deed was never seen by the plaintiff until after the same was recorded without her knowledge or consent on the 23rd day of



April, 1903, in Deed Book, volume 1255, page 195.

5. At the time the plaintiffs executed and delivered to The Dollar Savings Bank the mortgage above mentioned and borrowed from said bank the sum of \$3,500 to pay on account of said purchase money for said premises, the deed to the said Nettie E. Fernandez, mentioned in the first finding hereof, was delivered to the plaintiffs at the banking house of The Dollar Savings Bank, and by direction of the officers of said bank was taken by plaintiffs to the court house in Pittsburgh for record, and the same was left by the plaintiffs at the office of the County Commissioners on the 7th day of March, 1903, and plaintiffs supposed that the same was duly recorded until recently, when they were informed of the recording of the deed to Nettie E. Fernandez in trust for Gladys E. Fernandez.

6. At the time the plaintiffs applied to The Dollar Savings Bank for the loan above mentioned they were informed by the officers of said bank that it could not lend the money desired if the deed for said premises was made to Nettie E. Fernandez in trust for Gladys E. Fernandez, a minor, and thereupon Edward G. Hartje, attorney for John L. Gass, was instructed by plaintiffs to prepare a deed from John L. Gass and wife to Nettie E. Fernandez. This deed to Nettie E. Fernandez was executed and delivered at The Dollar Savings Bank, as above mentioned, and in some way the deed to Nettie E. Fernandez in trust for Gladys E. Fernandez was not destroyed but remained in existence.

7. It appears from the record of the Commissioners' Office of Allegheny county that in April, 1903, three certain deeds were left at said office to be registered, namely the following: T. H. B. McKnight to Edward G. Hartje for property in Leet township; Malinda Dietrick to Edward G. Hartje for property in Leet township, and John L. Gass to Nettie E. Fernandez, trustee, for property in Avalon. Said deeds were lifted on the 20th day of April, 1903, from the County Commissioners' office by Edward G. Hartje, whose receipt appears for the same; and on April 23, 1903, the three above mentioned deeds were left for record in the office

of the Recorder of Deeds for Allegheny county and by him were numbered respectively 12600, 12601 and 12602.

8. The last of said three deeds, viz., the one numbered 12602, is the deed which was prepared by the said Edward G. Hartje, attorney for John L. Gass, and executed by said Gass and his wife to Nettie E. Fernandez in trust for Gladys E. Fernandez, but which was not delivered, and which the parties intended to have destroyed.

9. Said deed was left for registration and record by said Edward G. Hartje along with the other two deeds belonging to him personally, and was recorded on the 23rd day of April, 1903, in Deed Book, vol. 1255, page 195. The registration and record thereof was not made by the direction, or with the knowledge or consent, of the plaintiffs or either of them, and was an accident or mistake.

10. The said Gladys E. Fernandez owned no property or estate, and no part of the purchase money for said premises was paid by her or by any person in her behalf.

#### CONCLUSIONS OF LAW.

1. That Nettie E. Fernandez is the owner in her own right absolutely, free from all trusts, of the premises situate in the borough of Avalon, being lots Nos. 1 and 2 in Leonard Delp's plan, recorded in Plan Book, vol. 11, page 16, as described in the deed to her from John L. Gass and wife, dated February 16, 1903, recorded October 15, 1906, in the Recorder's Office of Allegheny county in Deed Book, vol. 1491, page 203.

2. The deed to Nettie E. Fernandez, trustee for Gladys E. Fernandez, never having been delivered, and having been recorded by accident or mistake, and no part of the purchase money having been paid by or on behalf of said Gladys E. Fernandez, the same is null and void and should be cancelled.

3. That the plaintiff should pay the costs.

For plaintiff, *George C. Burgwin.*

For defendant, *Edwin Logan.*

The trial, on a statutory or legal holiday, of one accused of crime, is held, in *State v. Duncan* (La.) 10 L.R.A. (N.S.) 791, not to be null if it takes place with the consent or acquiescence of the accused.

(Common Pleas No. 2, Allegheny Co.)

**MOOSE BREWING CO. v. PENNSYLVANIA RAILROAD CO.***Railroads—Grade Crossing — Injury — Stop, look und listen—Non-suit.*

In an action to recover for injury to a team which was struck by a train at a grade crossing, it appeared that the driver stopped, looked and listened about thirty feet from the crossing. There was nothing in the nature of the crossing which would excuse him from obeying the ordinary rule of looking and listening just before going upon the tracks, and if he had done so the accident would not have happened. Judgment entered for defendant non obstante veredicto.

No. 166 July Term, 1905.

Opinion by SHAFER, J. Filed September 20, 1907.

The action is trespass for the value of horses and a wagon injured at a grade crossing of a public road over the railway of the defendant company, in Washington County, Pa. While the evidence of negligence on the part of the Railroad Company was somewhat slight, we are of opinion that it was enough to go to the jury. The question in the case is whether or not the plaintiff's driver was so manifestly guilty of contributory negligence that it is the duty of the Court to so decide upon the evidence. It appears from the evidence that the public road runs parallel with and close by the side of the railroad track for some considerable distance at a grade somewhat lower than that of the railroad; that the approach to the crossing was some 30 feet long and rose in that distance to the level with the railroad, and that the road then turned at right angles to the left across two railroad tracks. From the approach to the crossing and any point near the crossing itself there was an unobstructed view up the railroad for a great distance and down the road for a distance of some 350 feet or thereabouts, the view being obstructed at that distance below the crossing by a train of cars standing upon a switch. The plaintiff's driver, before the accident, was driving two horses with a load of coal at the side of the railroad and towards the crossing, and was detained by a freight train shifting cars on the track

nearest him. He stopped at the foot of the approach, some thirty feet or more from the crossing, and when the freight train had gone up the track some distance, after looking and listening again he proceeded up the grade to the level of the railroad and turned his horses upon the track, and just as the forefeet of the horses came upon the track he was struck by a train coming on his left, the horses were caught by something about the engine and dragged and the wagon dragged after them, and in that way the injury was done. It was testified that the foot of this incline leading up to the crossing was the ordinary place at which teamsters stopped. It did not, however, appear that there was any great difficulty about stopping at the top of the crossing itself. We are of opinion that there was nothing in the nature of the crossing in this case which would excuse the person going over it from the ordinary rule that he should look and listen immediately before going upon the track, and it seems perfectly plain that if the plaintiff's teamster had done so in this case the accident would not have occurred. We are therefore of opinion that the defendant is entitled to judgment non obstante veredicto.

It is ordered that judgment be entered for defendant, non obstante veredicto upon payment of the verdict fee.

For plaintiff, *W. S. Thomas.*For defendant, *Patterson, Sterret & Acheson.***Orphans' Court,**

ALLEGHENY COUNTY.

**In re Estate of JAMES M. GASTON, Deceased.***Collateral inheritance tax—Suspension of proceedings to appraise and collect—Divestiture of lien—Power to consume corpus.*

Testator gave the residue of his estate to his widow with power of sale, and the remainder of his estate at her death to collaterals. Held (1) that when the widow exercised the power of sale the lien of the collateral tax was divested as to the land sold and was transferred to the proceeds of sale. (2) That the widow could consume the corpus. (3) That the proceedings to appraise

and collect the tax must be suspended until her death.

No. 281 February Term, 1907.

Opinion by OVER, J. Filed December 31, 1907.

James M. Gaston died testate September 16, 1905, possessed of some personalty and ten acres of land in this county, which after giving some specific and pecuniary legacies, he disposed of in the residuary clause of his will as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath to my wife Maria Glen Gaston, for the term of her natural life with power to sell all or any part of said real and personal property to such persons, at such places and upon such terms as she shall see fit and make conveyance thereof by such deed and other instruments of writing as she may deem necessary or proper without the authority or order of Court, without giving security for the application of the proceeds and without liability upon the part of the purchaser for the application of the purchase money. The remainder of my real estate at her death I devise to five of my said sisters, namely: Jennie, Fannie, Sadie, Lizzie and Viola, and their heirs, share and share alike. The remainder of my personal estate at her death I bequeath to four of my said sisters, namely: Fannie, Sadie, Lizzie and Viola, to be their own absolutely, share and share alike."

The appraiser appointed by the Register to assess the collateral inheritance tax on the estate appraised the pecuniary legacies payable forthwith, and then appraised the surface of the land at \$3,800 and the coal at \$1,000, the residue of the personalty after deducting estimated debts and expenses at \$1,181.41, making a total appraisement of \$5,981.41, and deducted therefrom the present value of the widow's life estate \$2,623.41, leaving the value of the estate subject to tax \$3,933 upon which a collateral inheritance tax of five per cent has been assessed.

The legatees and devisees to whom the remainder of estate upon the death of the widow is given have taken this appeal, alleging that the widow claims she has the right to consume all of the residuary estate, and that if she has, that the value of their

bequests and devises cannot be fixed until her death.

The widow in the exercise of the power of sale given her in the will, sold the surface of the land on September 17, 1906, to William Rankin for \$3,800, who joins in this appeal alleging that the lien of the collateral inheritance tax was divested by the sale as to the land purchased by him and transferred to the proceeds of sale.

Under the first section of the act of May 6, 1887, Stewart's Purdon Digest, page 603, the collateral inheritance tax is imposed not on the estate of the decedent, but on the estate or interest passing from the decedent to collaterals or strangers. The residue of this testator's estate vested by his will in his widow for life with power to sell either realty or personalty, and her life estate is not subject to the tax. When she exercises her power of sale as to the realty it is converted into money, and upon her death the proceeds of such sale and not the land passes to the collaterals, and as the tax is imposed on the estate or interest passing to them its lien would be divested as to the land when sold and be transferred to the proceeds of sale. Had there been an equitable conversion by a positive direction to sell, the lien of the tax would have been so transferred, because the estate passing to the collaterals was not land, but the proceeds of the sale, and the same reason for so holding exists in this case; *Brown's Estate*, 5 D. R. 284; *Miller v. Ritchey*, 111 Pa. 321. Moreover if the lien of the tax is not divested by the sale to give good title the widow would be compelled to pay a tax out of the purchase money for which she was not liable, and the testator's intention that she should have the use of all the proceeds would be defeated. Then as the lien of the tax has been divested from the surface sold to Rankin, the appraisement and assessment as to it must be set aside.

In *Coxe's Estate*, 193 Pa. 100, it was held that,

"Where testator leaves his whole estate including mining leases to a trustee to pay the income to his wife and after her death to various nephews and nieces, and from the terms of the will it cannot be presently ascertained what persons will actually come into possession of the estate upon the death

of the widow, nor can the value of the estate at that time be determined, the Commonwealth cannot compel any person to enter security to pay the tax, but must wait until the death of the widow."

And the proceedings to appraise and collect the tax were dismissed and set aside. If the widow here has the power to consume the corpus of the residue there can be no question under the case cited that the appraisal should be set aside as to the whole of the residuary estate.

In *Markley's Estate*, 132 Pa. 352, the testator devised and bequeathed to his wife:

"All my property and effects, real, personal and mixed, of whatever nature and kind, for and during her natural life.

"3. It is my will and I hereby direct that at the death of my wife Elizabeth all of the residue of said property real, personal and mixed shall go to my children (naming them) and to their heirs in equal shares absolutely."

And it was held that the widow had the power to consume, and only the residue, if any, was to go to the children after the wife's death. In *Gold's Estate*, 133 Pa. 495, the testator disposed of his estate as follows:

"I give and bequeath unto my dear wife, Abigail, all and whatsoever is remaining after payment of debts all my property of whatever kind or nature the same may be after my decease to have, hold, use, possess and enjoy the same during her lifetime, and further it is my will and I do order that after my wife's death that all the remaining property of whatever kind shall be sold and divided among my five children in equal parts."

And it was held that the widow could consume the corpus. As here it is only the remainder of the estate at the widow's death that is given to testator's sisters, it seems she has the right to consume the corpus. But if she has not, the value of the estate which may pass to the collaterals at her death cannot now be determined. Under the will she has the power to sell both the real and personal property "without the authority or order of Court, without giving security for the application of the proceeds and without liability on the part of the purchaser for the application of the purchase

money." She takes all the residuary estate without giving security, and if she should leave no estate at her death the collaterals would get nothing and there would be no estate passing to them on which the tax could be assessed.

The proceedings to appraise and collect the tax so far as they relate to the residuary estate of the decedent are therefore dismissed and set aside, and its appraisal is suspended until the death of the widow; *Fosselman's Appeal*, 2 Pa. 228.

For plaintiff, *Andrew S. Miller*.

For defendant, *S. G. Nolan and J. C. Boyer*.

## Court of Common Pleas,

WASHINGTON COUNTY.

W. B. DEARMIN v. FLORA JANE DEARMIN.

*Divorce—Res judicata.*

A brought an action for divorce on the grounds of wilful and malicious desertion and the Court dismissed the libel. A brought another action for divorce on the grounds of natural impotence and inability to procreate, knowing of these facts at the time of the filing of the first libel. Respondent urged that divorce on second libel could not be granted for the reason that the Court had dismissed the first libel and the facts contained in the second libel were known at the time the first libel was filed.

No. 109 August Term, 1907.

Libel in divorce on the ground of natural impotence and inability to procreate.

Opinion by TAYLOR, J. Filed January 10, 1908.

There is no doubt but that the causes set out in the libel in this case may be made, at the will of either party, legal grounds for divorce. The evidence of the examining physicians establishes the impotence on the part of the respondent because of the reasons given by them. *Husbands on Married Women* 185-6. This point may be said not to be seriously disputed, but counsel for respondent urge that the divorce can not be granted for the reason the Court dismissed the libel of the husband for wilful and malicious desertion filed to No. 102 Novem-

ber Term, 1906. In the opinion of this Court filed in that case the matters were referred to which are relied upon in this case and was a cause of divorce then known to the husband. The Court, as may be noticed in that case, intended to dismiss that libel, without prejudice to the husband to file a new libel alleging the causes set out as then indicated, and he cannot be prejudiced in this action by the failure of the Court to have formally reserve that right to him. The libellant may have sought to spare the respondent in the first proceeding from the notoriety and publicity necessarily incident to the present charge, by alleging the cause of desertion in the former proceeding, owing to the prolonged absence of his wife from his home, which he failed in satisfying the Court was wilful and malicious.

And it is now, this 10th day of January, 1908, ordered that the parties libellant and respondent be divorced from the bonds of matrimony at the costs of the respondent, and that a formal decree to that effect be prepared by libellant's counsel.

For plaintiff, *Hughes & Hughes*.

For defendant, *Irwin, Wiley & Morgan*.

[From Harry Russell Myers, Esq., Washington, Pa.]

### Book Notice.

The committee on "Code of Professional Ethics" of the American Bar Association at the last annual meeting of the association recommended that its report be deferred until the annual meeting in 1908 and that Judge Sharswood's work on Professional Ethics be reprinted and distributed free of charge to members in order to familiarize them with the subject. This recommendation was adopted.

The publishing house of T. & J. W. Johnson Co. of Philadelphia, Judge Sharswood's original publishers, offered to print the edition at cost, and General Thomas H. Hubbard of New York personally subscribed the entire amount necessary to print and distribute it. Both offers were accepted and the work is now in book form and in the hands of the members of the association. Sharswood's Professional Ethics was first published in 1854 and no higher testimonial of its worth could be given than the reprint

of the book by the association at this time. It is interesting to note that the subject of Professional Ethics is receiving widespread attention by the Bar Associations of the different states and no less than ten state associations have adopted codes, most, if not all, being those of the western and southern states. The careful examination of this subject by the committee and its recommendations to the association and the action taken there will go far in determining the advisability and practicability of such codes.

A judgment or order committing to jail upon a charge of contempt in disobeying a decree, made in the absence of the person, is held, in *Mylius v. McDonald* (W. Va.) 10 L.R.A. (N.S.) 1098, to be void.

Community property which is not brought brought the court in a divorce proceeding is held, in *Ambrose v. Moore*, (Wash.) 11 L. R. A. (N.S.) 103, to be held by the parties after the decree, as tenants in common.

The right to maintain an action in the courts of one state for accrued installments of alimony under a decree of divorce rendered in another state is denied in *Hunt v. Monroe* (Utah) 11 L.R.A. (N.S.) 249, where no sum as been fixed as presently due, and the decree is liable to modification by the court rendering it, upon application of either party at any time, for good cause shown.

The question whether or not the Hepburn law operated to repeal the Elkins law so as to bar prosecutions commenced after the enactment of the Hepburn law, for acts committed prior thereto and in violation of the Elkins law, has been up for consideration in several federal courts, and it has been held that such prosecutions were not barred, in *United States v. Standard Oil Company*, 148 Federal Reporter 719; *United States v. Chicago, etc., R. Co.*, 151 Federal Reporter 84; *United States v. Delaware, Lackwanna & Western R. Co.*, 152 Federal Reporter 269, and *United States v. New York Central & Hudson River R. Co.*, 153 Federal Reporter 630.

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PITTSBURGH, PA., FEBRUARY 12, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### WETTENGEL et al. v. ALLEGHENY COUNTY LIGHT CO.

*Streets—User—Stretching wire across—Interference with public corporation.*

An electric wire stretched across a street in a city under agreement between two property owners becomes a nuisance when it interferes with the wires of a corporation having the right to use the streets for the purpose of supplying electricity to the public and maintenance will be enjoined.

No. 1252 April Term, 1906.

Opinion by SHAFER, J. Filed July 26, 1907.

The bill is for an injunction to restrain the defendants from cutting and destroying a wire stretched across a street in the Nineteenth ward of the city of Pittsburgh by the plaintiffs for the purpose of conducting electricity. A cross-bill was thereupon filed by the defendant, praying for an injunction to restrain the plaintiffs in the original bill from maintaining any wires on any highways of the city of Pittsburgh, above, below or near the wires of the light company, and to require the removal of wires already put up.

#### FINDINGS OF FACT.

1. The Allegheny County Light Company, the defendant, is a corporation of the state of Pennsylvania engaged in manufacturing and supplying electricity to the public, and is authorized by law to maintain poles and wires upon the public highways.

2. By an ordinance of the city of Pittsburgh, passed in the year 1881, the defendant company is authorized to erect and maintain poles and wires for the purpose of supplying electricity to the public on any of the

streets, lanes and alleys of the city of Pittsburgh.

3. The plaintiffs in the original bill are owners of a small plant for producing light by means of electricity. Before the time of the grievance complained of in the bill they had obtained the permission of the respective owners of the properties on opposite sides of Kirkwood street, in the Nineteenth ward of the city of Pittsburgh, to stretch a wire directly across the street between these two opposite properties, attached to the houses on each side of the street, for the purpose of conveying electricity to persons residing on the other side of Kirkwood street from their electric plant, and in pursuance of this permission and license they had stretched such a wire and were using it for the conveyance of electricity. The wire was at such a height above the ground that it could not interfere with any use of the street for vehicles.

4. The defendant company had a wire or wires strung longitudinally on Kirkwood street, whether put up before or after the wire of the complainants does not seem to be material. The defendant company on one or more occasions cut the wire maintained across the street by complainants, and this bill was filed to prevent a threatened cutting of the wire by the defendant company, which thereupon filed its cross-bill for the removal of the wire as a nuisance.

5. The defendant company has two wires, as we understand it, on Kirkwood street, running along one side of the street, at a considerable distance one above the other, and the wire of the complainant passes across the street between them as above stated, so that one wire of the light company is above and the other is below that of the complainants. It is claimed by the light company that there is danger to the public and to those who use the electric light from the possible sagging or breaking of any of these wires so as to bring them into contact. We find the fact to be that if the upper wire of the light company should fall on that of the plaintiffs, or if that of the plaintiffs should fall on the lower wire of the light company, some damage would be done to the light company's wires by the contact, and there would be great danger to the persons using the electricity supplied by

either party, and that the maintenance of the wire across the street by the plaintiffs interferes in some measure with the use of the street by the light company for the purpose of conducting electricity, and requires of it a closer inspection of its wires than would otherwise be sufficient and therefore an additional expense.

#### CONCLUSIONS OF LAW.

1. A wire stretched across the street by the two opposite owners or by their licensee is not necessarily a nuisance, but may be or become such according to circumstances. The owners of the opposite lots are presumed to own each to the middle of the street, and they may each use the street for any purpose that does not interfere with the public user. Their use, however, must be completely subordinate to that of the public. While the wire complained of in this case has not been shown to interfere with the ordinary use of the street by the public, it does interfere in some measure, as has been found, with the use of the street by the light company, which is a public user. The user by the light company is concurrent with that of the public who use the street for passage of vehicles and foot passengers and with other electric and telegraph companies who may have a right similar to their own to use the street. It is not, however, concurrent with but is superior to that of the owners of the soil over which the street passes, and if the user attempted to be made by those owners interferes in any degree with a public user it will constitute a nuisance.

2. To constitute an interference with the public user of the street by the light company it is not necessary that the wire complained of should be in contact with those of the light company or physically obstruct the wires or poles of that company. We are of opinion that if its existence endangers wires of the light company to any appreciable extent it must be deemed to be a nuisance.

3. The light company being especially injured by the maintenance of the wire of the complainants, being in fact the only party who is injured thereby, has standing to maintain the bill for its removal.

It is therefore ordered that the bill of the

complainants be dismissed, and that upon the cross-bill of the defendants the complainants in the original bill be enjoined from maintaining the wire in question described in the bill, and that the defendants in the cross-bill be ordered and directed to remove the wire in question within ten days after the entry of a final decree in this case.

For plaintiffs, *W. S. Miller.*

For defendant, *Reed, Smith, Shaw & Beal.*

### Court of Common Pleas,

WASHINGTON COUNTY.

#### COMMONWEALTH ex rel. WRIGHT v. MARSH.

*Boroughs—Burgess—Act of June 6, 1893, P. L. 335—Consolidation—Quo warranto—Demurrer.*

A was elected burgess of a borough incorporated by act of assembly in the year 1810. The corporate limits of said borough were enlarged by consolidating with two other adjoining boroughs at two different times under act of June 6, 1893, P. L. 335, at each time obtaining from the commonwealth a new charter; the last charter being dated May 12, 1902. On December 2, 1907, A's borough was again consolidated with an adjoining borough, incorporated August 19, 1891. B, the burgess of the adjoining borough, prayed for a writ of quo warranto on A to show by what authority he claimed to exercise the office of burgess. On demurrer filed, writ of quo warranto refused.

No. 72 February Term, 1908.

Opinion by TAYLOR, J. Filed January 15, 1908.

This is a legal proceeding to inquire into, and the right to determine the office or franchise now being exercised by A. C. Marsh as chief burgess of the borough of Washington, Washington county, Pa., instituted by and on behalf of one J. R. Wright in the name of the commonwealth of Pennsylvania, the relator, who makes suggestion and complains and prays that a writ of quo warranto may be issued against the said A. C. Marsh to show by what authority he claims to exercise the office of chief burgess of the borough of Washington since the second day of December, A. D. 1907,

and that the said A. C. Marsh be ousted from said office of chief burgess; that he, the relator, the said J. R. Wright, be adjudged and decreed to be entitled to, and that he be allowed the office of chief burgess of the borough of Washington under its present charter, with the rights to receive its emoluments, exercise its powers and discharge its duties.

The respondent to the rule issued at the suggestion of the relator has made answer thereto admitting all the facts as set forth in the petition of the relator, and, after replication filed by the relator, filed a general demurrer to the relator's whole case for the reason that it is insufficient in law and shows no legal ground why judgment should not be entered in favor of the respondent upon his answer filed. This leaves but one question, purely a legal one, for the court to pass upon in detesmining the question at issue, namely, whether under the fifth section of the act of June 6, 1893, P. L. 335, entitled "An act for the consolidation of boroughs and the government and regulation thereof," the relator or the respondent, since the second day of December, 1907, is the chief burgess of the borough of Washington. Section fifth of said act provides that "The chief burgess of that borough which shall have been first incorporated shall be the chief burgess of the new borough, to serve as such until a chief burgess shall have been elected and duly qualified in accordance with the laws of this commonwealth," and the controversy narrows itself down to the single question, was the borough of Washington, or the borough of West Washington, prior to December the second, 1907, the older or first incorporated?

As early as 1810, on the 13th day of February, the town of Washington in the county of Washington was, by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, erected into a borough, which was called "The Borough of Washington," comprised within certain boundaries named, and by said act was made one body politic and corporate in and by the name of "The Burgesses and Inhabitants of the Borough of Washington in the County of Washington," and from said year 1810, and has thereafter

and now has continued to be the "Borough of Washington" with enlargement of territory under act of the general assembly from time to time.

The territory comprised in the town of West Washington, adjacent to the borough of Washington, was on the 19th day of August, 1891, at No. 54 May term of Court of Quarter Sessions of Washington county, incorporated into a borough, under the corporate name, style and title of the "Borough of West Washington," which said decree is of record in the recorder's office in said county in deed book 167 at page 255, and it so continued to be the borough of West Washington, as incorporated, up until the second day of December, 1907, when it became consolidated into one borough with the borough of Washington in due form under the provisions of the several sections of the act of June 6, 1893, and at the time of its consclidation with said borough o Washington into one borough the said relator, J. R. Wright, was the duly elected chief burgess of said borough of West Washington, having been elected to said office on the third Tuesday of February, 1906. And that said respondent, A. C. Marsh, was, prior to said consolidation, the acting chief burgess of the borough of Washington, having also been elected to said office on the third Tuesday of February, 1906.

In 1901 the boundaries of the borough of Washington were enlarged by its consolidation with the borough of South Washington under the provisions of the act of June 6, 1893, P. L. 335, and on the 27th day of June, A. D. 1901, a charter was issued by the governor of Pennsylvania to the said consolidated boroughs under the name of the "Borough of Washington," and on the 12th day of May, 1902, the boundaries of the borough of Washington were further enlarged, under the provisions of said act, by its consolidation with the borough of North Washington, and on the said date a charter was issued to the said borough of Washington by the governor of Pennsylvania. And the contention on the part of the relator is that West Washington, being incorporated prior in date to the consolidation of the borough of Washington with South and North Washington, must be considered by



the court, since West Washington's consolidation with the borough on December the second, 1907, as the first borough incorporated, and claims the office of chief burgess of the borough of Washington under the consolidation of December 2, 1907, as against A. C. Marsh, who was the duly elected chief burgess of the borough of Washington.

With the relator's contention we cannot agree, and while there are no decisions directly in point construing this fifth section of the act of 1893, P. L. 335, we are of the opinion that it cannot be made to apply to the present controversy, as claimed by the relator. The borough of Washington having been incorporated in the year 1810 and having continued under that corporate name ever since, never changing its name and never ceasing to be incorporated as the "Borough of Washington," cannot be said by letter or spirit of said act to have lost its identity in embracing within its territory the several constituent boroughs from time to time surrounding it and with which it became consolidated into one borough, preserving throughout the corporate name of the "Borough of Washington," and all its property, rights, franchises and privileges originally by law invested in it.

"A borough is a creature of the state, it is created for the convenience of the inhabitants and is authorized by the state to exercise a portion of the state's sovereignty within a particular territory." While it exists as a borough it has authority to legislate for that borough within the limits of the power conferred upon it by the state. It is, as already stated, a mere creature of the state and the same power which created it may at any time wipe it out of existence. Being a creature of the state, clothed with the power to legislate for the territory comprised within its boundaries, within the limits of the power conferred upon it, it follows necessarily that if at any time it ceased to be an incorporated borough, all legislation enacted by it for the government of the borough must fall. That is to say, the borough being clothed with limited power to legislate for the benefit of the citizens of the borough, could not lawfully pass an ordinance which would be binding upon the citizens of that territory after the borough

itself, as a creature of the state, ceased to exist.

On several occasions since the consolidation of the several boroughs contiguous to the borough of Washington, we have decided that the ordinances relating to the borough of Washington did not become inoperative by virtue of the several consolidations and the issuing of a new charter, on the principle that the identity of the borough of Washington has never been lost or ceased to exist under these several consolidating proceedings, and the reason for such decisions was that it seemed to the court to follow logically that the old ordinances were still in force because the corporate name of the borough enacting them had been preserved, although a new charter had been issued.

In our opinion the Supreme Court of the United States, in *Girard v. Philadelphia*, 7 Wallace 1, has settled the principle which governs this case.

The city of Philadelphia was incorporated in 1701 under the name of "The Mayor, Aldermen and Citizens of Philadelphia." The city was subsequently re-incorporated under the same name in 1798. It consisted of a rectangular piece of land, two miles long and one mile wide, extending from the Schuylkill to the Delaware rivers. Around the city of Philadelphia and throughout the territory of the county of Philadelphia there had grown up twenty-eight different corporate bodies. By the act of February 2, 1854, the city of Philadelphia, whose corporate name was as above stated, was consolidated with the other twenty-eight municipal corporations, comprising the entire county of Philadelphia, under the corporate name of "The City of Philadelphia." Prior to that consolidation Stephen Girard, by his will, had created a trust in "The Mayor, Aldermen and Citizens of Philadelphia," and subsequent to the consolidation act of 1854 the heirs of Stephen Girard filed a bill in equity to determine the question of whether or not "The City of Philadelphia," which was the new corporation, had power to administer the trust. The Supreme Court of the United States, Mr. Justice Grier delivering the opinion, held that the trust was still in existence, and that "The City of

Philadelphia" had power to administer the trust. The decision was put on the grounds:

First. By the terms of the Consolidation Act it was provided that all estates and bequests held in trust by the old city of Philadelphia and each of the townships and boroughs consolidated were vested in "The City of Philadelphia," "upon and for the uses, trusts, limitations, charities and conditions as the same were then held by the said corporations respectively."

And secondly. It was expressly ruled in the second paragraph of the reasons for the decisions as given by Justice Grier, and as found on page 16, that, "B. By the supplement to the act incorporating the city (commonly called the Consolidation Act.) *The identity of the corporation is not destroyed;* nor can the change in its name, the enlargement of its area, or increase in the number of its incorporators affect its title to property held at the time of such change."

In the opinion of Justice Grier it is said, "It is not insisted that the mere change or abbreviation of the name has destroyed the identity of the corporation. The bill even admits that a small addition to its territory and jurisdiction might not have that effect, but that the annexation of twenty-nine boroughs and townships has smothered it to death or rendered it utterly incapable of administering trusts and charities committed to it when its boundaries were Vine and South streets and the two rivers. There is nothing to be found in the letter or spirit of this act which shows any intention in the legislature to destroy the original corporation, either by changing its name, enlarging its territory or increasing the number of its corporators. To the contrary, 'all its powers, rights, privileges and immunities, etc., are continued in full vigor and effect.'"

By the act of 1893, P. L. 335, the act involved here for construction, it is provided that upon the consolidation of "The Borough of Washington" with the borough of West Washington, as well as by the recent consolidation of "The Borough of Washington" with the borough of North Washington, all the property, rights, franchises and privileges then by law vested in either and both of said boroughs should be transferred

to and vest in the borough formed by such consolidation. The "Borough of Washington," as it existed under the act of 1810, was enlarged by its consolidation with the borough of South Washington just as the city of Philadelphia, under the corporate name of "The Mayor, Aldermen and Citizens of Philadelphia" was enlarged by its consolidation with the other twenty-eight municipal corporations within the county of Philadelphia. If, as the Supreme Court held, the city of Philadelphia under the corporate name of "The Mayor, Aldermen and Citizens of Philadelphia" did not lose its identity by being consolidated with twenty-eight other incorporated municipalities, under the corporate name of "The City of Philadelphia," and, accepting that as an authority, it cannot be claimed logically that "The Borough of Washington," under the corporate name of "The Burgesses and Inhabitants of the Borough of Washington in the County of Washington," lost its identity by being consolidated with the borough of South Washington under the corporate name of "The Borough of Washington."

There being no dispute, as we have said, on the facts of the case at bar, and applying to it the logic and principle applied and laid down by the highest court of the nation in *Girard v. Philadelphia*, supra, it follows that "The Borough of Washington," having been incorporated in 1810, as between the borough of Washington and the borough of West Washington as involved in this suggestion of the relator, as under the provisions of the fifth section of the act of 1893, is the first incorporated borough and therefore the chief burgess of "The Borough of Washington" since, as before December 2, 1907, is the chief burgess of "The Borough of Washington."

And now, January 15, 1908, this case came on to be heard on the pleadings in the case and argument of counsel, whereupon, upon due consideration, the general demurrer filed is sustained and the writ of quo warranto prayed for by the relator, J. R. Wright, is refused at the costs of the relator.

For relator, *A. S. Sprowls.*

For respondent, *Irwin, Wiley & Morgan.*

[From Harry Russell Myers, Esq., Washington, Pa.]

(Common Pleas. Washington County.)

**McNARY v. SOUTH WEST PEN-  
SYLVANIA PIPE LINE.**

*Motion to lift non-suit—Negligence—Trespass.*

A brought suit against B for trespass alleging negligence in maintaining a pipe line across his lot. On the trial A failed to prove that there was any break in defendant company's line or that the oil which percolated into well of plaintiff came from the line nor were there such facts proven in the case, on the part of the plaintiff, in the absence of direct testimony on the point, that would lead the mind of the jury to an irresistible inference that the oil on plaintiff's property came from the defendant's line. Non-suit granted.

No. 43 November Term, 1905. Motion to lift compulsory non-suit.

Opinion by TAYLOR, J. Filed January 20, 1908.

The plaintiff's statement in this case declares on an action of trespass based upon the alleged negligence of the said defendant company in that, "The defendant company was engaged in the transportation of oil by pipe line operated through the borough of Houston, Washington county, Pennsylvania, and near a lot owned by the plaintiff, upon which is erected a dwelling where plaintiff resides.

"That within some two months last past, the plaintiff had occasion to sink a water well upon his premises in order to procure a supply of water for domestic purposes.

"That it is the duty of the defendant company so to maintain and operate its pipe line near plaintiff's property as to avoid leakage or seepage therefrom and to prevent the oil occasioned by any leak in the said pipe line from percolating through the surrounding soil so as to render the water flowing therefrom free from impregnation.

"But notwithstanding its duty in this behalf, the said defendant for two months last past has negligently, wrongfully and continuously permitted its pipe line near plaintiff's property, in the borough of Houston, in the county aforesaid, to be out of repair and leak in such manner and to an extent that the oil therefrom has leaked and continued to leak from the pipe line into

the surrounding soil and percolate through the same, impregnating the water flowing through plaintiff's property and into his well sunk thereon, so that the water from said well has been rendered foul and unfit for use, and the whole strata of earth to a great depth on plaintiff's lot has been so saturated with the leakage and seepage from said pipe line that another well cannot be sunk thereon with the hope of obtaining pure water, whereby plaintiff has been injured and his property depreciated in value and he has suffered damage to the amount of \$1,000, to recover which sum he brings suit."

The above are the material averments of the plaintiff's statement to be considered in disposing of this motion to take off non-suit, and the evidence introduced by the plaintiff on the trial of the case.

By this statement there is a direct charge of negligence by the plaintiff against the defendant, and the cause of such negligence and the damages alleged to have followed therefrom specifically set out in the plaintiff's statement. It is too well settled for the citation of authorities that where a party brings a suit against another, charging negligence in the conduct of his business, before he can recover he must show that the defendant has failed to perform some legal duty that he owed to the plaintiff. There is no doubt but that the plaintiff would have a right of action against the defendant company if he proves in his case in chief what he avers in his statement, and the authorities cited by the counsel for plaintiff in his brief of same to lift this non-suit contain a reference to some cases on this point. But there must be some evidence in the plaintiff's case to show that there has been a failure on the part of the defendant, where he avers it, that the act complained of was negligently done.

At the trial of this case the plaintiff simply proved that there was a pipe line laid for the purpose of transporting oil through it in the vicinity of plaintiff's lot. There was not a syllable of evidence in the case that there was any break in the defendant company's line, or that the oil, which percolated into the well of the plaintiff, came from the line, or that there were such facts proven in the case on the part of the plaintiff, in the

absence of direct testimony on the point, that would lead the mind of the jury to an irresistible inference that the oil on plaintiff's property came from the defendant's line.

It was shown by the plaintiff that the stratum out of which this oil seeped into the plaintiff's well, during the digging of it, and other water wells in the immediate vicinity, was open and porous and channery, and it was also shown by the plaintiff that oil and gas wells had been drilled in that basin, in which gas and oil in not great quantities had been discovered and oil and gas wells abandoned. It was also brought out of plaintiff's witnesses on cross-examination that the stratum through which the oil seeped into plaintiff's well rendered it possible that the oil would come from a greater distance than the pipe line, and possibly from some of these abandoned oil wells. It was also in evidence in the plaintiff's case, by way of cross-examination of some of the witnesses, that a branch of Chartiers creek that flowed nearby the plaintiff's property brought down from considerable distance at times oil on its waters. So that at the conclusion of the plaintiff's evidence when the motion for a compulsory non-suit was made by the defendant's counsel there was no evidence in the case that the defendant company's pipe line had broken, that any oil escaped therefrom, that it ran into plaintiff's premises, or that there was a breach of any legal duty on the part of the defendant, and there were no such facts and circumstances in the plaintiff's evidence upon which the jury could base a verdict in his behalf except upon a mere guess. The plaintiff did not even introduce any evidence to show that the defendant's pipe line was in use or that any oil had at any time passed through it. The lot owned by the plaintiff, and which he alleges was damaged by the negligence of the defendant, was purchased by him on July 15, 1901, many years after the laying of the pipe line under a right of way obtained from David C. Houston. There was no attempt made to show that there were any other pipe lines in this vicinity from which oil might have escaped.

The action being based upon a charge of negligence and there being no contract rela-

tion between the parties the burden of proof is upon the plaintiff to establish that negligence.

"Except where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the happening of the accident and a consequent injury, but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. The burden thus thrown upon the defendant is not that of satisfactorily accounting for the accident but merely that of showing that he used due care." *Stearns v. Spinning Company*, 184 Pa. 519; *Oil Co. v. Torpedo Co.*, 190 Pa. 350; *Carson v. Bromley*, 184 Pa. 549; *Starr v. Traction Co.*, 193 Pa. 536; *Dalton v. Borough*, 215 Pa. 402; *Hall v. Simpson*, 203 Pa. 146.

The jury would not, in this case, have been justified in inferring that the injury resulted from the proximity of this pipe line and the leakage of oil therefrom. If the case had been submitted to the jury on the testimony of the plaintiff they may have presumed that the oil found percolating through the plaintiff's soil came from the defendant's pipe line and they might therefore have presumed that the defendant was negligent in permitting it so to escape, but this would be asking the jury to infer one fact from an inference of another fact based upon an admitted or established fact, and this cannot be permitted. A presumption must be based on a fact or facts and not on a presumption. Thus, as stated by Justice Paxson, in *Railroad v. Hernice*, 92 Pa. 431:

"Where a fact is established in a cause by evidence the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver was asleep or intoxicated at the time of the accident, the presumption of negligence would properly arise, but the fact from which such inference is to be drawn must first be established. It will not do to presume that he was in the condition referred to from some rumored fact in no way connected with the case and upon this presumption base the additional presumption of his negligence.

That it would be found a presumption upon a presumption, which is never allowed. A presumption should always be based upon a fact and should be a reasonable and natural deduction from such fact." *Welsh v. Railroad*, 181 Pa. 461; *Douglass v. Mitchell*, 35 Pa. 443; *Waters v. Wolf*, 2 Supr. Ct. 206; *Hershinger v. Pennsylvania Railroad*, 25 Supr. Ct. 155.

When the motion made was for a compulsory non-suit the counsel for plaintiff endeavored to get away from the charge of negligence, embodied in his statement of claim, and to make the case stand as one of nuisance instead of negligence, under the authority of a number of cases reported in our state. This he cannot do for several reasons; in the first place, the statement shows that it is based upon an allegation of negligence; and second, this case is clearly distinguishable on facts and principle from the cases relied upon by the plaintiff. The nuisance cases are always those in which the nature of the business carried on is such that the unavoidable consequence, or at least the consequence naturally to be anticipated, is an injury to adjoining properties or their occupants, etc. Therefore, the question of negligence does not necessarily arise and recovery for the injury done can be had no matter what care may have been exercised by the defendant. *Pottstown Gas Co. v. Murphy*, 39 Pa. 263; *Robb v. Carnegie*, 145 Pa. 324.

It was not shown in this case that leakage or seepage from an oil well is either a necessary or usual incident of its operation. The defendant company is a company, not carrying on a business upon its own land, but is a company having the right of eminent domain, and is operated under an easement obtained from David C. Houston, the former owner of the land and through whom the plaintiff claims title to his lot. Counsel for defendant in his brief makes a point that also would have its bearing in this case, when it was attempted to be argued on the trial that the case is one of nuisance; that is that this leakage and seepage is an ordinary accompaniment of the operation of a pipe line, then upon the authority of *Denniston v. Philadelphia Co.*, 101 Pa. 41, the probable injury resulting to this land by the mainten-

ance and operation of the pipe line has all been settled upon obtaining an easement or right of way, and plaintiff, claiming title under David C. Houston, can not recover damages for these consequential injuries. The same cases which establish a doctrine that an action for nuisance may be maintained also clearly recognize the distinction for which defendant contends. Thus, in *Hock v. Pipe Line Co.*, 153 Pa. 366, cited by the plaintiff in his brief, it is ruled:

"Where a corporation is clothed with the right of eminent domain and is expressly authorized by law to construct its works and operate them, any injury resulting from such operation, without negligence and without malice, is *damnum absque injuria*, where a corporation has no right of eminent domain, the operation of its works, causing consequential injuries to another, is a nuisance." *Rogers v. Philadelphia Traction Co.*, 182 Pa. 473; *Garigan v. Refining Co.*, 186 Pa. 604; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. 541.

And now, January 20, 1908, this case came on to be heard on motion to lift compulsory non-suit, moved for by the defendant at the conclusion of plaintiff's evidence, and was argued by counsel, whereupon, upon due consideration of the oral arguments and the respective briefs filed, the motion to lift compulsory non-suit is refused and judgment of compulsory non-suit ordered to be entered.

For plaintiff, *T. F. Birch*.

For defendant, *John H. Murdock & Son*.

[From Harry Russell Myers, Esq., Washington, Pa.]

Whether the testimony of a bankrupt, upon the hearing of an application by the trustee to compel him to turn over certain property, shall be heard orally, taken in long hand or by a stenographer is within the discretion of the referee, according to the holding in *Matter of Goldstein*, 19 Am. B. R. 96, which also holds that where, in such case, the trustee has no funds, and the bankrupt claims to be absolutely without means, his motion that the trustee be directed to pay for the stenographer's minutes of the bankrupt's testimony and the referee's fees and disbursements will be denied.

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No. 32.

PITTSBURGH, PA., FEBRUARY 19, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

**EMRICK v. BEECHVIEW - MT.  
LEBANON TRANSFER CO.**

*Mechanics' liens—Notice of filing—Form—Act  
of June 4, 1901.*

The provisions of the mechanics' lien law requiring notice of filing a lien do not require the same precision as those relating to the lien itself.

The absence of the number and date of filing in such will not invalidate the lien, provided the notice is sufficiently definite to answer the substantial requirements.

M. L. 28 January Term, 1908. Sur rule to strike off lien.

Opinion by FRAZER, P. J. Filed January 28, 1908.

Defendant's contention is that this claim should be stricken off because the notice of filing does not in all respects comply with the requirements of the 21st section of the Mechanics' Lien Act of 1901. That section provides as follows:

"Within one month after the filing of the claim the claimant shall serve a notice upon the owner of the fact of the filing of the claim, giving the court term and number and the date of the filing thereof, and shall file of record in said proceedings an affidavit setting forth the fact and manner of such service."

The notice complained of was served on defendant within thirty days after filing the lien and is as follows:

"You are hereby notified that a Mechanics' Lien has been filed against you by W. J. Charles and A. L. Emrick, trading as Charles & Emrick, for the sum of Eight hundred five and 54-100 (805.54) Dollars, for the work done and material furnished for and upon a certain two story frame

building, located on lot No. 691 in Beechwood Improvement Company's Plan No. 2, West Liberty Borough, and that the same appears of record at No. — January Term, 1908, Mechanics Lien Docket."

Defendant's contention is that the notice is insufficient because it does not set forth the number of the term at which the lien is filed and also fails to state the day upon which it was filed; in all other respects the notice meets the requirements of the act.

If these omissions were matters required to be set forth in the claim itself, we should feel obliged to make the rule absolute, because in such cases substantial conformity with the act will not answer: *B. & L. Assn. v. Connor*, 216 Pa. 544. In the case of notice required by the act the same precision, however, is not required as in the lien. This motion, it seems to us, is ruled by *Este v. R. R. Co.*, 27 Superior Court 525. In that case as in this the question involved was the sufficiency of the notice given by the contractor to the owner, and the court said:

"The object of the notice is to protect the owner from making payments to the contractor when his property is liable to be subjected to a lien. It should be sufficiently definite to enable the owner to ascertain the amount of the lien claimed, its date and the nature and amount of the labor and material out of which it arises. These requirements are met in this case. The notice gives the facts necessary to enable the owner and the contractors to identify the claim in all its particulars, and to discover that it is based upon orders of the plaintiff out of which a liability by contract arises against the contractors. It was apparently not the legislative purpose to require the same exactness of form in the notice that is required in the lien, and the notice in question meets all the substantial requirements of the statute."

The notice in this case, we think, meets all the substantial requirements of the act and is therefore sufficient, at least to prevent this rule from being made absolute.

And now, January 28, 1908, rule discharged.

For plaintiff, *J. Warren Hunter*.

For defendant, *W. E. Walsh*.

(Common Pleas No. 2, Allegheny Co.)

**W. E. ALBERTS CO. v. OPPERMAN***Mechanics' liens—Payment to sub-contractors—Striking off lien.*

On a motion to strike off a mechanics' lien it was shown that the claim had been paid by payments to sub-contractors after notice that they intended to file a lien. Held, that these payments were equivalent to payments to the contractor and the lien should be stricken off.

The fact that on paying off sub-contractors the owner received certain stock held by them as collateral did not affect the question of lien. The title to the stock must be determined in another proceeding.

M. L. No. 50 July Term, 1907. Sur rule to show cause why mechanics' lien should not be stricken off.

Opinion by SHAFER, J. Filed January 23, 1908.

The ground alleged for striking off the lien is that the claim for which it is filed has been fully paid by the defendant to the plaintiff, and upon this question testimony was taken and the matter submitted. There is no substantial dispute between the parties as to the facts. Moneys paid by the defendant to sub-contractors after receiving notice that they intended to file a lien, and after notice given by him to the receiver, constitute a part of the payments upon which defendant relies to show payment of the lien. It is argued by the plaintiff's counsel that the receiver was not bound upon receiving notice from the defendant of these claims, to either pay them or show cause why they should not be paid as provided by the act; this because the receiver is claimed by the plaintiff to be in a different position than other claimants. We can not agree to this proposition, but are of the opinion that the payments so made are good payments on the lien. Besides, it is not claimed or suggested that they were not properly paid nor that the claimants to whom they were paid did not in fact have a lien.

The principal matter upon which the plaintiff relies is the allegation in its answer to the rule that one, W. E. Alberts, was the owner of certain shares of coal stocks which

he pledged to a sub-contractor on the building as security for its bill, and that upon the payment of that bill by the defendant these shares were turned over to the defendant who still has possession of the same, and that they are worth \$4,000 and ought to be turned over to the receiver as part of the assets of the plaintiff company, and it is claimed by the plaintiff that it has a right to set off this \$4,000 of stock against the payments made by Opperman on the lien. We do not see how this can be done, for two reasons, first, because it does not appear that the plaintiff company has any interest in the shares; and, second, because if it did so appear, such a claim could not be set off against payments made upon the lien, or be litigated in this matter. Defendant's counsel frankly admits that if these matters are determined against it the lien ought to be considered paid, and therefore stricken off as paid.

The rule is therefore made absolute.

For plaintiff, *W. T. Treadway*.

For defendant, *Ivory, Kiskaddon & Moore*.

(Common Pleas No. 2, Allegheny Co.)

**KENYON v. DAVIS.***Equity—Execution—Equity rules—Rule 88.*

Rule 88 of the Equity Rules providing that execution may issue in the usual form to execute a decree for the payment of money does not apply to a case where the defendant is required to give a purchase money mortgage and also pay taxes.

No. 201 January Term, 1907. Sur petition to stay execution.

Opinion by SHAFER, J. Filed February 7, 1908.

The bill is for specific performance of a contract to convey land, and a final decree was entered on June 22, 1907, which was affirmed upon appeal to the Supreme Court, which directs the defendant to make specific performance of his contract upon tender of a deed to him by paying the plaintiff \$85,000 in cash and certain interest and any taxes paid by the plaintiff on the land for 1906 or thereafter, and that he execute to the plaintiff his mortgage for \$100,000. It appears from the petition and answer that while the

cause was pending in this court, the buildings on the land in question were burned; that the insurance on them amounted to \$86,000 upon policies some of which were held by the plaintiff and some by the defendant; that the parties had agreed before the fire that in case of fire all the moneys received by either party from fire insurance should be credited to the unpaid purchase money owing by the defendant, whether due or not, until the purchase money should be paid in full, and that after the fire it was agreed between them that all the insurance money should be paid by the insurance companies to the plaintiff without prejudice to their respective claims as to the application of it to the purchase money. After the decree above recited had been made nisi, the defendant presented his petition to this court asking for a rehearing to enable him to put into the case these matters with regard to the insurance money, and that the findings of fact and conclusions of law filed by the court should be withdrawn. This petition was refused on the same day that the final decree was made.

The plaintiff has now issued a writ of fieri facias on the decree above mentioned and also a writ of execution attachment and has levied upon property of the defendant. The defendant now complains that the execution was prematurely issued and that no execution should issue without its first being determined by the court how the insurance money, which the parties agreed should be applied to the purchase money, should be applied.

We are clearly of opinion that the decree above recited is not within the provisions of Rule 88 of the Equity Rules, which provides that "Final process to execute any decree may, if the decree be solely for the payment of money, be a writ of execution in the form used in the same court in suits at common law in actions of assumpsit." The decree is not solely for the payment of money, but requires the defendant as part of the performance of it to make a certain mortgage to the plaintiff and to pay to the plaintiff whatever he may have paid for taxes, the amount of which does not appear to have been yet ascertained. The dispute between the parties as to the application of

the insurance money, which is not mentioned in the decree, but which it must be admitted must be applied somewhere, ought to be determined before any process should issue upon the decree. It appearing, therefore, that the writs of fieri facias and execution attachment issued upon the plaintiff's praecipe herein, were issued without authority of law, it is ordered that the same be set aside.

For plaintiff, *Marron & McGirr.*

For defendant, *Hosack, Knox & Hosack.*

## Court of Quarter Sessions,

BEAVER COUNTY.

### COMMONWEALTH v. GAMBLE.

*Liquor law—Selling without a license—Druggist—Prescription.*

Where a druggist sells liquor upon the presentation of a prescription of a physician without making any inquiry for what purpose the purchaser wants the liquor, and without making any inquiry whatever as to what use he intends to make of it, the druggist may be convicted of selling liquor without a license.

No. 48 September Term, 1907. Indictment for selling liquor without a license.

Opinion by *HOLT, P. J.* Filed October 21, 1907.

The defendant, Frank Gamble, stands indicted on the charge of selling liquor without a license. Under the laws of this commonwealth it is made a misdemeanor for any person without a license to sell any spirituous, vinous, malt, or brewed liquors, or any admixture thereof. The act assembly approved May 13, 1887, is the act which regulates the sale of intoxicating liquors in Pennsylvania at retail. Section 16 of this act reads in part as follows:

"Section 16. That druggists and apothecaries shall not be required to obtain a license under the provisions of this act, but they shall not sell intoxicating liquors except upon the written prescription of a regularly registered physician."

Gentlemen, the acts of assembly are for the courts to interpret; and we say to you that the courts of Pennsylvania have never interpreted, and we do not think they ever



will interpret, this act of assembly to mean that a physician may promiscuously issue to anybody who simply requests it a prescription for liquor, and that a druggist may fill any number of prescriptions that may be issued by physicians. If this were the law, gentlemen, then no retail houses would actually be a necessity; all that would be necessary under such circumstances would be a sufficient number of doctors to write a sufficient number of prescriptions, and a sufficient number of druggists to fill the prescriptions. Our understanding of this law, gentlemen, is entirely in harmony with the views expressed by Judge McIlvaine in his charge to the grand jury in Washington county the next year after this act of assembly was passed. Among other things he said this:

"A physician should only give a prescription as a physician, acting strictly in the line of his profession; and it should be filled by the druggist as other prescriptions of physicians are filled. The law never intended that a prescription should be made the cover under which liquor should be sold to be used as a beverage."

So, gentlemen, it is where the physician is acting strictly in the line of his duty, and issues a prescription to a person who has made application for it, and when the physician ascertains either from objective symptoms or from subjective conditions that he may issue a prescription lawfully. That is, the physician should either make an examination of the patient, or, if an examination of the patient would not disclose any ailment, it is then the duty of the physician to ply the person who makes the application with the necessary questions, and thereby satisfy himself whether or not the person who makes the application is entitled to receive the liquor for purposes of treatment. In other words, gentlemen, the physician is not permitted to issue a prescription for liquor to be used for any other purpose than medicinal purposes. I am speaking now of whisky; there is an exception in favor of alcohol to be used for mechanical and medicinal purposes.

Gentlemen, where a physician has properly issued a prescription, the druggist who fills that prescription is not liable under the act.

Where the circumstances of a given transaction are such as to convince a druggist that the liquor is not intended for medicinal purposes, but is to be used as a beverage, then, gentlemen, the physician's prescription does not protect the druggist in selling.

Now, gentlemen, what were the circumstances attending this transaction? You have the testimony of C. O. Gallagher, who has detailed to you the circumstances under which he went to the defendant's place of business. He testifies that he asked the defendant for whisky, and that the defendant replied that he could not give it to him without a prescription. Now, gentlemen, was the fact that Mr. Gallagher asked the defendant for liquor without any statement as to why—if he did not make any statement why he wanted it—was that a circumstance that should have put the defendant upon inquiry? Was the fact that the witness, Ward, who appeared before you on the witness stand was with Mr. Gallagher a circumstance, taking into consideration the appearance of Mr. Ward, which might indicate that this liquor was intended to be used as a beverage, and not to be used for medicinal purposes?

You have the testimony of Mr. Gallagher, then, that he went to the physician to get the prescription; and you have his statement as to what he says he made known to the physician. He testified that upon his request for a prescription the physician issued this prescription. The physician, gentlemen, has come upon the stand and testified that he did issue the prescription; that Mr. Gallagher stated to him that he was sick and wanted the whisky.

We say to you, gentlemen, that it is a circumstance for your consideration that the physician made no examination of Mr. Gallagher, either by ascertaining any symptoms of any ailment, or by plying him with the necessary questions as to what his ailment was. That is a circumstance for your consideration in determining whether or not this physician issued this prescription lawfully. If he issued this prescription unlawfully, and the circumstances detailed by Gallagher and Ward as to what took place when they went to the defendant's place of business before going to the physician are

such as to indicate to you that the defendant either knew or should have known from the circumstances that this liquor was not to be used for medicinal purposes, then, gentlemen, we say to you that the transaction, if you believe it took place either knowingly or recklessly on the part of the defendant, would be a violation of law.

On the other hand, gentlemen, you have the testimony of the defendant. He has testified that Gallagher and Ward came to his place of business before they went to the physician for the prescription, they told him they were sick, or words to that effect. If you find that they did so state to this witness, then you will take that fact into consideration as a circumstance in favor of the defendant. And you will likewise take into consideration the testimony of the defendant as to what occurred after Gallagher and Ward returned with the prescription. And you will also take into consideration the testimony of the physician, who has testified in the case. And you will ascertain from all of the evidence on both sides of the case whether or not the prescription was a cloak to cover up an illegal transaction. If you find that it was, and that the defendant knew of the fact that it was such a cloak, then the defendant would be guilty in manner and form as he stands indicted. If you are not so satisfied, but if you believe the prescription was issued by the physician in good faith, acting in the line of his duty, and that there was nothing in the circumstances to put the defendant upon inquiry as to whether or not the prescription was issued and obtained in good faith, that would be an end of the case in favor of the defendant. On the other hand, if the physician did issue the prescription unlawfully, not in the line of his duty or business as a physician, and the circumstances were not such as to indicate to the defendant that the prescription had not been issued in good faith, then, gentlemen, he would not be guilty in that view of the case.

You will take into consideration all of the evidence on both sides of this case. We have not undertaken to mention all of the evidence, but you will take it all into consideration; and if we misstated any of the evidence, or any part of it, you will correct

us; for you are not bound by any statement of the court in relation to the evidence, unless it is a correct statement.

When one is brought into a criminal court charged with an offense, the presumption of law is that he is innocent; and the jury must be convinced beyond a reasonable doubt of his guilt before he can be convicted. And a reasonable doubt is not an imaginary or a fanciful doubt, it is not something conjured up to enable the jury to escape the consequences of an unpleasant verdict, but it must be a reasonable doubt, arising out of all the evidence in the case after a careful consideration of it, and such as causes your minds to hesitate before reaching a conclusion.

Some comment has been made upon the circumstances under which this information was obtained. We say to you that sometimes it is difficult, if not impossible to obtain evidence of violation of the law, except through detectives who will set to work to obtain the evidence. The fact that the evidence was obtained in the manner testified to by the witnesses does not make such evidence unlawful; but the circumstances under which the evidence was obtained is simply a matter which goes to the credibility of the witnesses when you come to a consideration of any disputed question of fact.

You will decide every disputed question of fact, gentlemen, from the evidence; and you will reconcile conflicting statements, if any, if you are able to do so. If you are not able to do so you will then determine whom you will believe; and in doing that you will take into consideration the credibility of the witnesses; and as to their credibility you will consider their manner and appearance on the witness stand, their means of knowing the matters to which they testified and their interest, if any, in the result of your verdict.

Formerly, in this commonwealth, a defendant in a criminal case was not permitted to be a witness in his own behalf, because of the inclination to testify to that which was not correct; but the law has now removed that disqualification, and has made every person charged in a criminal court a competent witness to testify in his own be-

half; but the jury may take into consideration in weighing his testimony his interest as the defendant.

If you are satisfied, gentlemen, beyond reasonable doubt, under all the evidence, that the defendant is guilty, you will render a verdict of guilty in manner and form as he stands indicted; if you are not satisfied beyond a reasonable doubt of his guilt, it is your duty to acquit him. You will take the case, gentlemen.

For commonwealth, *J. B. McClure.*

For defendant, *J. F. Reed.*

[From *J. B. McClure, Esq., Beaver, Pa.*]

## Executive Department,

HARRISBURG.

### POOR FOOD PENALTIES.

*Criminal law—Pure food act of 1907—Imprisonment for non-payment of penalty.*

A defendant against whom judgment has been rendered in proceedings instituted under section 9 of the pure food act of June 1, 1907, P. L. 386, may, in default of payment of the penalty and costs, and for want of sufficient distress, be imprisoned under an appropriate writ issued by process of law.

Request of Dairy and Food Commissioner Foust for opinion.

Opinion by CUNNINGHAM, Assistant Deputy Attorney-General. Filed December 20, 1907.

I have your letter of November 30, 1907, asking to be advised by this department whether, under the terms of section 9 of the pure food act of June 1, 1907, P. L. 386, a defendant against whom judgment has been rendered for the penalty therein provided and costs, who has not appealed therefrom, and who is not possessed of property out of which the amount of said judgment can be collected, may be imprisoned in default of payment of said judgment and costs.

The reply to your inquiry depends upon whether an action brought under said section 9 of said act of 1907 is within the purview of the act of July 12, 1842, P. L. 339, entitled, "An act to abolish imprisonment for debt, and to punish fraudulent debtors." Section 9 of said act of 1907 reads as follows:

"Any person who shall violate any of the foregoing provisions of this act shall, for each offense, forfeit and pay the sum of sixty dollars, together with the costs of suit, to be recovered as debts are by law recovered, in an action to be instituted, in the name of the commonwealth, before any alderman, magistrate, or justice of the peace, in the county wherein the offense shall have been committed; and no appeal shall be allowed from any judgment rendered in such case, except upon special allowance of the court of common pleas, subject to all the rules and regulations applicable to appeals from actions in summary convictions."

Notwithstanding the peculiar phraseology in the last clause of the above quoted section, to the effect that appeals shall be subject to all the rules and regulations applicable to appeals from actions in summary convictions, the said section seems to provide substantially for a suit for a penalty before an alderman, magistrate, or justice of the peace in the county wherein the offense is committed.

You now ask to be advised whether a defendant against whom judgment has been rendered by a magistrate, and from whom the amount of the penalty and costs cannot be collected by execution, can be imprisoned in default of payment of the penalty and costs, provided, of course, no appeal has been taken by the defendant from the judgment so rendered.

Section 1 of said act of 1842, abolishing imprisonment for debt, provides as follows:

"That from and after the passage of this act no person shall be arrested or imprisoned on any civil process issuing out of any court of this commonwealth, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, excepting in proceeding as for contempt, to enforce civil remedies, action for fines or penalties, or on promises to marry, on moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment, in which cases the remedies shall

remain as heretofore; Provided, that this section shall not extend to any person who shall not have resided in this state for twenty days previous to the commencement of a suit against him."

It is further provided in section 23 of said act as follows:

"No execution issued on any judgment rendered by any alderman or justice of the peace, upon any demand arising upon contract, express or implied, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of the alderman or justice of the peace, either that such judgment was for the recovery of money collected by any public officer, or for official misconduct."

Whether a defendant in the situation above described can be imprisoned in default of payment of the penalty and costs depends, therefore, upon whether or not such defendant is within the protection of the said act of 1842.

This question has been passed upon by our Supreme Court in the case of *Com. ex rel. Colbert v. Kerr*, 25 Pitts. L. J. 367. That case arose under the old oleomargarine act of May 21, 1885, P. L. 22. Section 3 of said act of 1885 provides as follows:

"Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale, or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the commonwealth as debts of like amount are by law recoverable; one half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery."

Section 3 of the act of 1885 and section 9 of the act of 1907 provide for practically

the same method of inflicting and collecting the respective penalties specified in said acts. Under the act of 1885 every person violating the provisions thereof "shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the commonwealth as debts of like amount are by law recoverable;" and under the act of 1907 every person violating the provisions thereof "shall, for each offense, forfeit and pay the sum of sixty dollars, together with the costs of suit, to be recovered as debts are by law recovered in an action to be instituted in the name of the commonwealth before any alderman," etc.

The case of *Com. ex rel. Colbert v. Kerr*, supra, arose under said act of May 21, 1885. Said Colbert, the relator in said proceedings, was so proceeded against before J. M. Courtney, one of the justices of the peace of the county of Allegheny, for a violation of the act of 1885, that a judgment was rendered against him for the penalty of \$100 therein provided for and costs, and, in default of payment of said penalty and costs, a writ seems to have been issued by the said magistrate, directed to John L. Kerr, one of the constables of the county of Allegheny, directing him to take the said Colbert into custody and commit him to prison. The said George F. Colbert, defendant in the proceedings before the magistrate and relator in the subsequent proceedings, thereupon presented a petition to the court of common pleas of Allegheny county for a writ of habeas corpus, which writ was awarded as prayed for, returnable forthwith, with notice to the said constable. After hearing the said court made the following order:

"Now, March 26, 1895, after hearing on petition, return and record, the prisoner, defendant, is remanded to the custody of the officer on the writ on which he was arrested."

The said George F. Colbert thereupon presented a petition to the Supreme Court of Pennsylvania, setting forth, inter alia, that he was unjustly held and detained in custody by the said constable on an execution for \$100 in favor of the commonwealth; that the judgment upon which execution issued was founded on a suit brought under

said act of May 21, 1885; and praying for a writ of habeas corpus. On April 8, 1895 [25 Pitts. L. J. 36], the Supreme Court handed down a per curiam decision, the material portion of which is as follows:

"But we have examined his petition, and are satisfied that he is not entitled to a writ of habeas corpus. A judgment recovered for a penalty prescribed by law as the punishment for the commission of an act forbidden by a clear statutory provision is not within the purview of the act to abolish imprisonment for debt. It is not a judgment founded on a contract, but a penal infliction intended to discourage the violations of the law as truly as a fine imposed upon an offender after conviction in the quarter sessions."

This decision of the Supreme Court rules the question submitted by you to this department, and you are therefore advised that a defendant against whom judgment has been rendered in proceedings instituted under section 9 of the said act of 1907, may, in default of payment of the penalty and costs, and for want of sufficient distress, be imprisoned under an appropriate writ issued by the magistrate before whom the case was tried, until discharged by due process of law.

NOTE.—As to appeals from summary convictions, see *Com. v. McCann*, 174 Pa. 19; *Com. v. Courtney*, 174 Pa. 23; *Com. v. Menjou*, 174 Pa. 25; *Com. v. Yocum*, 29 Sup. Ct. 428; *Com. v. Luckey*, 31 Sup. Ct. 441.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

### Recent Bankruptcy Decisions.

It has been held, *In re Banner*, 18 Am. B. R. 61, that an agreement that \$5,000 deposited with the landlord by a tenant of mortgaged premises shall be security for his full performance of the covenants of the lease, and to be applied upon the last six months' rent and upon which the landlord agreed to pay interest, creates nothing more than the relation of debtor and creditor between the parties, as to the deposit, and the tenant, while he continues in the possession of the premises, must pay the rent notwithstanding the landlord has been adjudicated

a bankrupt and an action commenced to foreclose the mortgage, and is only entitled to prove his claim for the \$5,000 as a general creditor.

In *Matter of Reinboth*, 19 Am. B. R. 15, it has been held that a trustee in bankruptcy is bound to use due diligence to get in the assets of the estate and may be charged with the value of assets lost by failure to discharge such duty.

In the case of *Leon Wechsler v. United States*, 19 Am. B. R. 1, it was held that the immunity provision of section 7(9) of the bankruptcy Act, that no testimony given by a bankrupt upon his examination thereunder "shall be offered in evidence against him in any criminal proceeding," does not exempt him from criminal prosecution for giving false testimony upon such examination.

Where a customer of a firm of stock brokers, upon opening an account, or in the course of dealings, for speculative purposes, deposits securities under an agreement that they shall not be sold, except to meet marginal requirements on account of losses, the U. S. Circuit Court of Appeals, Second Circuit, has held, *In re Jacob Berry & Co.*, 17 Am. B. R. 467, that the transaction constitutes merely a pledge of the securities, and where the brokers hypothecate them to obtain a loan to themselves, the customer is entitled to recover their proceeds from the trustee in bankruptcy from the brokers.

In the case of *Vehon v. Ullman*, 17 Am. B. R. 435, the president of a corporation doing a mail order business made a list of the names and addresses of persons to whom the corporation could present its business, and kept copies of said list at his house as a protection in case of loss by fire. Upon the adjudication of the president and the corporation the original list only was scheduled and sold as a corporation asset. It was held that both the original list and the copies thereof were the property of the corporation and the president could not be denied his discharge for failure to include the copies of the schedule of his personal assets.

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PITTSBURGH, PA., FEBRUARY 26, 1908.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### COMMONWEALTH ex rel. STEW- ART v. ALLEGHENY COUNTY.

*Commutation of sentence—Act of May 11, 1901.  
Constitutional law—Powers of governor.*

The act of May 11, 1901, directs that on a report from the warden of a prison showing good conduct on the part of a prisoner and a recommendation from the board of pardons the governor shall commute a certain part of the sentence annexing a condition thereto that if the prisoner is again convicted before expiration of original sentence he shall be required to serve the remainder of the term in the prison in which confined on second conviction. Held, that the Constitution having placed the subject of pardons, reprieves, etc., in the hands of the governor the act in question does not affect the governor's powers.

The governor may annex a condition to a pardon or commutation and having annexed the condition named it is valid as an act of the pardoning power.

A prisoner whose sentence has been commuted with condition as above named may on second conviction be held in the prison to which he is sent to serve out the original term.

No. 35 January Term, 1908. Habeas corpus.

Opinion by SHAFER, J. Filed November 27, 1907.

The relator is held as a prisoner in the Allegheny County Workhouse, and the return to the writ and the accompanying answer of the defendant, who is the keeper of the workhouse, show that the relator was, on December 22, 1904, sentenced to imprisonment in the Allegheny County Workhouse for a term of eighteen months, upon a conviction in Allegheny county of entering a building with intent to commit a

felony, the crime having been committed after January 19th of that year. It appears from the answer and evidence, and is not denied, that on August 16, 1897, the relator was sentenced by the court of oyer and terminer of Washington county to serve a term of ten years in the Western Penitentiary, upon a conviction of a felony, and that he was released from the penitentiary on January 19, 1904, being three years and seven months before the expiration of his sentence of ten years. He was so released upon an order of the governor under the seal of the commonwealth, delivered to the wardens of the Western Penitentiary, and now produced in court by him, which order recites a report of the warden made to the governor in pursuance of the act of May 11, 1901, P. L. 166, in relation to commutation of sentences and the recommendation of the pardon board, and directs that, in consideration of the premises, the prisoner above named should have the benefit of the provisions of that act of assembly to the extent of taking three years and seven months from his sentence, subject to the provision that if during the period between the date of his discharge and the date of the expiration of the full term for which he was sentenced, he be convicted of any felony, he shall, in addition to the penalty which may be imposed for such felony, be compelled to serve in the prison, penitentiary or workhouse in which he may be confined for such felony the remainder of the term, without commutation, which he would have been compelled to serve but for this commutation, and that the prisoner should be discharged from prison on June 16, 1904. The relator produced a certificate of the secretary of the commonwealth of the proceedings in accordance with this discharge, which certificate shows a certificate of the warden, said to be as directed by the act of May 11, 1901, P. L. 166, recommending the commutation of three years and seven months, and approval thereof by the board of directors of the Western Penitentiary, the transmission thereof by that board to the governor, the reference of it by the governor to the board of pardons, and the recommendation of the board of pardons that the commutation be made, and the following order:

Office of the Governor,  
Harrisburg, Pa., December 9, 1903.

Let commutation issue in accordance with  
the recommendation of the board of pardons.

(Signed) SAM'L W. PENNYPACKER,  
Governor.

The act of Assembly of May 11, 1901, P. L. 166, directs that the governor shall, in commuting the sentence of convicts, annex the condition such as that contained in the governor's order above recited. The defendant claims to hold the prisoner for three years and seven months after the expiration of his sentence of eighteen months upon the above mentioned provisions of the act and the condition contained in the governor's order, and it is claimed by the relator that the act is unconstitutional, that the record shows that the governor did not annex the condition to the commutation, and that, if he did, it is illegal and unreasonable.

The first attempt on the part of the legislature to authorize the reduction, or, as it is called in the act, the commutation, of sentence, was by the act of May 1, 1861, P. L. 462, which authorized the inspectors of prisons to discharge prisoners before the expiration of their sentences upon certain conditions. In the case of the *Com. v. Halloway*, 42 Pa. 446, this act was held unconstitutional, not as an attempt to assume the governor's prerogative of pardon, but as an interference with the judgments of the judiciary. The act of May 21, 1869, P. L. 1267, was thereupon passed, which provided for the commutation of sentence "if the governor shall so direct." It would seem that this act was passed upon the theory that a commutation or reduction could be had only by virtue of the governor's pardoning power, it having been already held that it could not be done under legislative authority merely. Although the Constitution of 1874 restricted the governor's power by requiring the recommendation of a board of pardons, no notice appears to have been taken of that fact, and reductions or commutations continued to be made under the act of 1869. The act of May 11, 1901, P. L. 166, was thereupon passed, which is an expansion of the act of 1869, and provides that every convict may, "if the governor shall so direct," have a certain commutation, that the

keepers of prisons shall make a certain report to the governor as to the conduct of prisoners, and that the act shall be read to every convict when first committed to prison. It also provided that the governor shall not execute any of the powers "therein granted unto him" except upon recommendation of the board of pardons, and, as above stated, that the governor "shall" annex the condition above mentioned to the commutation. Art IV, section 9, of the Constitution confers upon the governor the power "to grant reprieves, commutation of sentences and pardons," pardons and commutations, however, to be granted upon the recommendation of certain officers. The whole matter having been thus placed in the hands of the governor by the constitution, it follows, of course, that the legislature cannot in any way direct or control the governor in the exercise of this power. So far as the act regulates the question of inspectors of prisons with regard to making reports and recommendations to the governor and directs the reading of the act to prisoners, it is a valid law; so far as it directs that any condition be annexed to commutations, it is nothing more than a mere request to the governor, which he may heed or not as he pleases; and the condition annexed to the commutation must therefore be treated as made by the governor under his constitutional authority only.

It is argued in this case that, because the certificate of the proceedings furnished by the secretary of the commonwealth shows an order that commutation issue without any condition annexed or to be implied, the sentence was commuted or the relator pardoned without condition. The formal order, however, under the seal of the commonwealth, upon which the relator was discharged from the penitentiary, and which must have been produced to him, does contain the condition in question, and the order relied upon by the relator is a mere note directing the formal document to be drawn. We are of opinion, therefore, that the case is to be treated as if the act of assembly did not exist, except, perhaps, that it may be considered that the legislative request to the governor to annex the condition furnishes authority to the keepers of prisons other

than the prison to which the party was sentenced to detain him upon breach of the condition.

It was held in *Flavell's Case*, 8 W. & S. 197, that the governor may annex a condition to a pardon, and the release of the prisoner in this case, although called a commutation, is more properly described as a pardon. As we understand it, a commutation of sentence is an exchange of one punishment for another, whereas a pardon is the release from punishment or from further punishment. However that may be, we are of opinion that the governor had power to annex the condition in question to the order of release, and that it lies upon the relator to perform it. It is suggested by the relator that the condition in this case is unreasonable and illegal, in that it calls for imprisonment in a different prison from that to which he was originally sentenced. The case just cited, however, holds that if the condition of a pardon is void the pardon itself is void, and if, therefore, we should hold the condition in this case to be illegal, the prisoner would be in much worse condition than he now is, for the result would be that he ought to be remanded to the Western Penitentiary to serve out the balance of his sentence, and he would thereby have no credit for the time which he has served in the workhouse since June 22, 1906, when his term of imprisonment in that institution under the second conviction expired. If the condition was a valid one there can be no doubt that the prisoner is properly detained. The objection that the law has not provided any definite means of certifying to the keeper of the second prison the fact with regard to the first conviction and release, while it does point out a serious omission in the law, does not help the relator. The fact is that he is detained, and properly detained, and it does not concern him that others in like case may be more fortunate because the law has provided no adequate machinery for certifying to the keeper of prisons cases of breach of the condition.

It is suggested that the prisoner has the right to a hearing before he is recommitted or detained upon breach of the condition. It seems to us that a man who is at large after the breach of the condition upon which he

was pardoned or his sentence commuted is the case of an escaped prisoner, who may and should be detained by any one who has knowledge of the fact. If he claims that his arrest or detention is improper, either upon the ground of mistaken identity or a denial of the breach, he is entitled to a hearing upon a writ of habeas corpus, as in the case of any person who is unlawfully restrained of his liberty, and that is a sufficient and complete remedy.

It appearing, therefore, that the relator was released from the Western Penitentiary by the governor under his constitutional pardoning power upon condition that, if convicted before the end of his full term of another felony, he should, after serving the sentence for the second felony, then be detained in that prison for the remainder of the term for which he was first sentenced, and that this is a valid condition, and that the keeper of the workhouse is authorized by the act to retain him upon such breach, and that the condition was in fact broken by the relator, we are of opinion that the relator is not unlawfully restrained of his liberty, and that it is the duty of the defendant to keep him in custody until the expiration of three years and seven months after the expiration or other determination of the term of eighteen months for which he was sentenced to imprisonment in that prison.

It is therefore ordered that the prisoner be remanded.

For plaintiff, *Lyon, Hunter & Burke.*

For defendant, *Alexander Gilfillan.*

## District Court, United States,

WESTERN DISTRICT OF PENN'A.

In the Matter of FERDINAND F.  
BAHR, Bankrupt.

*Assignment for creditors—Exemption—Bankruptcy—Additional exemption.*

Where a bankrupt makes a voluntary assignment for the benefit of his creditors and receives from his assignee his exemption he cannot subsequently claim an additional exemption after being adjudged a bankrupt pursuant to a petition and the filing of schedules by his assignee in bankruptcy.



No. 3250, in Bankruptcy.

Opinion by EWING, J. Filed January 31, 1908.

On May 11, 1906, the bankrupt made a voluntary assignment of all his property for the benefit of his creditors, excepting and reserving the statutory exemption. The assignee accepted the trust and on May 24, 1906, \$300 worth of the assignor's property was appraised and set aside to him under his claim for exemption.

The assignee had so far proceeded in the discharge of his trust that by June 25, 1906, he had converted into money most of the personal property of said assignor, on which date the assignee presented his voluntary petition in bankruptcy, with proper schedules attached, and was adjudged a bankrupt and F. W. Hays chosen as trustee. There is no property specified in the bankrupt's schedules which was not included in his deed of assignment. The bankrupt now claims the benefit of the exemption in the bankruptcy proceeding, and the question is as to his right so to do under this state of facts.

Unquestionably, both the assignment and the bankruptcy are but parts of one insolvency proceeding, both instituted voluntarily by the bankrupt and the latter before the conclusion of the former. The bankrupt having obtained the benefit of the exemption provided by the state statute in the proceeding under his assignment, the effect of permitting him the benefit of a similar exemption in the bankruptcy proceeding would be to give him twice the amount said statute allows and set a precedent which others might be inclined to follow, and thus practically raise the statutory provision from \$300 to \$600. The bankruptcy petition has somewhat the appearance of having been filed for the express purpose of obtaining an additional exemption.

By his deed of assignment the bankrupt devoted all his property, except \$300, to the payment of his creditors, who thereupon took an equitable interest in and title to his estate, outside of the amount of said exemption, and the legal title thereto was vested in his assignee. This was the status of affairs when he filed his petition in bankruptcy, the effect of which was to transfer

the legal title to his property to the trustee in bankruptcy, but left the equitable title in his creditors. Thus, technically, when he instituted the bankruptcy proceedings, he really had no title to this property and it was not in his possession.

The bankruptcy act provides that this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws, etc. In this instance the bankrupt had the benefit of the exemption provided by the state laws in force at the time in the assignment proceeding, and the state law certainly did not contemplate that after he had had it in that proceeding, by taking a different proceeding he could again claim it out of the same property from which his exemption had already been allowed.

It is therefore concluded the bankrupt is not entitled to his exemption in this proceeding and the account of the trustee must be corrected by striking therefrom such allowance.

For bankrupt, *Peter M. Speer*.

For creditors, *Ash & Barr*.

(U. S. District Court, Western District of Pa.)

### **HAYWOOD COMPANY et al. v. PITTSBURG INDUSTRIAL IRON WORKS.**

*Bankruptcy—Delivery of timber to bankrupt—  
Fraud—Rescission of contract.*

In October, 1906, plaintiff took an order from defendant for certain timber, delivery of which was not made until October, 1907. In December, 1906, defendant mortgaged its real estate to its full value and in August, 1907, assigned all its contracts and assets without plaintiff's knowledge, and in November following disclosed its insolvency to its creditors. These acts of the bankrupt were concealed from plaintiff before delivery of the timber, which was not paid for. Held, that as no creditor had been misled or injured by this transaction, which on the part of the defendant was in fraud of the plaintiff, the latter was entitled to a re-delivery of the timber.

No. 3781, in Bankruptcy.

Opinion by EWING, J. Filed January 31, 1908.

This is a rule on the receiver to show

cause why certain lumber sold and delivered to the bankrupt by one, J. W. Cottrell, should not be delivered to the said vendor.

It seems that in October, 1906, Cottrell took an order from the bankrupt for certain large timbers which had to be procured on and shipped from the Pacific coast and that it was about the 1st of October, 1907, when delivery was made to the bankrupt, while on or about December 1, 1906, defendant placed upon its real property a mortgage for an amount equal at least to the full value thereof, and in addition thereto, on or about August 1, 1907, the bankrupt, without said Cottrell's knowledge, made an assignment of all its bills receivable, contracts and assets of practically every description; and furthermore, about November 2, 1907, submitted a statement to its creditors disclosing its insolvency.

It will thus be seen that the bankrupt voluntarily so pledged and encumbered its entire estate that at the time the lumber was delivered it had placed itself in a position where it was impossible for it to make payment therefor according to the contract. Unquestionably had the vendor known these facts he would not have made delivery, and the acts of the bankrupt in so encumbering and disposing of its property between the time of the contract for, and delivery of, the lumber, and its receipt of the lumber at the time it was advising its creditors of its insolvency, amount to a fraud on said Cottrell and entitles him to relief.

The receiver admits having the lumber in his possession and contests the right of Cottrell to have delivery thereof made to him simply on the ground that he contends said Cottrell is but an ordinary general creditor of the bankrupt. Upon the facts above stated, and without enlarging upon them, I think it is decidedly a case where the said Cottrell occupies a position far in advance of an ordinary general creditor. The conduct of the bankrupt was concealed from Cottrell until after he had made delivery of the lumber. The lumber was only received by the bankrupt immediately preceding its bankruptcy and no creditors were misled or influenced thereby to their detriment, and the bankrupt itself has no right or equity under the circumstances to retain the mate-

rial. The rapidity with which the disposition and encumbering of its property by the bankrupt followed the giving of this order for this lumber and its persistency in continuing that conduct up until the lumber was actually received and it declared to its creditors its insolvent condition, tend to show a lack of bona fides in the whole transaction from its very inception to its close.

The rule is therefore made absolute and the receiver directed to deliver to said Cottrell all of said material now in his hands.

For petitioner, *Ralph L. Smith.*

For creditors, *R. T. McCready.*

### Court of Common Pleas,

DAUPHIN COUNTY.

#### DICKINSON v. MIDDLETOWN SHALE BRICK CO. et al.

*Equity—Principal and agent—Discovery—  
Demurrer.*

The corporation defendant and individual defendants recognized and treated the plaintiff as their agent to effect a sale of the property and plant of the corporation, and subsequently refused to inform the plaintiff as to what they did in the making of a sale of the corporate property to the purchaser who had been introduced by the plaintiff. Thereupon plaintiff filed a bill in equity to enforce payment of compensation for thus effecting the sale, either actually or constructively. Demurrer filed, that there was a complete and adequate remedy at law. Held, that plaintiff was entitled to the discovery of the information withheld by the defendants, and the demurrer was overruled.

No. 373, Equity docket. Demurrer.

Opinion by MCCARRELL, J. Filed January 11, 1908.

The plaintiff has filed his bill in the case to enforce payment of compensation alleged to be due him under a contract for effecting sale of property and plant of the Middletown Shale Brick Company, either actually or constructively.

The corporation defendant has answered and the individual defendants have severally demurred, alleging that the bill discloses no cause of action or ground for equitable relief as against them respectively; that the bill is

multifarious; that it alleges no joint liability, and that the bill shows that the plaintiff has full, complete, and adequate remedy at law.

These demurrers are now before us for consideration. The allegations of the bill must, of course, be taken as true.

In the third paragraph the plaintiff alleges that the several individual defendants named in his bill are and were at the time of the grievances complained of stockholders of the defendant corporation, and owned and controlled substantially all the stock of said company, and further alleges that he is not informed in what proportions these several defendants so own and control the stock of the corporation.

In paragraph four the plaintiff alleges that on or about June 1, 1905, the defendant, John C. Nissley, claiming to be the holder of a large amount of the stock of the corporation defendant, and to be authorized to represent it by reason of his holdings of stock, employed the plaintiff to negotiate a sale of the entire property and plant of the corporation, and agreed to pay him five per cent. commission upon the gross amount received therefor.

He further alleges in the same paragraph that he relied upon the representations of said Nissley that any contract made by him would be recognized and adopted by the other stockholders, and accepted the said employment which was subsequently ratified and confirmed by other stockholders and particularly by the defendant, Frank Nissley, and that after July 18, 1905, the plaintiff was recognized and treated by the corporation defendant, as well as by the stockholders thereof, as their agent and broker for the purpose of selling the said property and plant under the terms and conditions of his employment aforesaid.

In this paragraph it is clearly alleged that the plaintiff was employed to effect a sale of the plant and property of the defendant company; that while this employment was made by the stockholders it was subsequently ratified and confirmed by other stockholders, and that the plaintiff was recognized and treated, not only by the corporation through its officers, but by the stockholders, as their agent and broker to effect a sale of the property and plant of the corporation upon the terms stated.

The plaintiff in paragraph five alleges that in pursuance of his employment, he proceeded to effect a sale, and after negotiations extending from June 12 to July 22, 1905, brought the United States Brick Company of Reading, Pa., and the Middletown Shale Brick Company, or their respective representatives, together as seller and purchaser.

In paragraph six he alleges that for the purpose of enabling him to discharge the duties of his employment, he obtained from the defendants samples of clay and shale used by the corporation defendant at its plant, and also obtained from the defendant full information with regard to the plant in which they were interested, its capacity, facilities for transportation, etc., and furnished the same to the United States Brick Company, and further alleges that the "defendants had at all times knowledge of these matters and were fully informed as to the progress of the negotiations being made by the plaintiff for a sale of the said plant and property, not only with the United States Brick Company, but with other parties as well."

In paragraph seven the plaintiff alleges that after he had brought the representatives of the United States Brick Company and the Middletown Shale Brick Company together, as seller and purchaser, a sale was effected and the property of the Middletown Shale Brick Company was sold and transferred by the sale and assignment of its capital stock either to the United States Brick Company, or to some person in its behalf, and that said company, in pursuance of said sale and assignment took possession of said property about December 10, 1905, and has since been operating it as one of its brick manufacturing plants in Pennsylvania.

The plaintiff therefore claims in paragraph eight that he has complied with the terms of his employment and is entitled to the commission due him under the terms thereof, but that the defendants, for the purpose of avoiding payment of the commission due the plaintiff, pretend and claim that their transaction with the United States Brick Company was not such a sale of the property and plant of the Middletown Shale Brick Company as was contemplated by his em-

ployment, and refuse either to pay him his commission or to give him any information as to the actual terms of sale.

The plaintiff's bill, as we interpret it alleges a contract made with a large stockholder of the corporation defendant, who represented that any contract made by him would be recognized and adopted by the other stockholders for the sale of the plant and property of the corporation defendant, he, the plaintiff, to have a commission of five per cent. upon the purchase price in case a sale was effected.

The bill further alleges that the contract thus made was ratified and confirmed by other stockholders and by the treasurer of the corporation, and that after his employment thus effected he was recognized and treated by the company and by the stockholders thereof as their agent and broker for the purpose of selling the said property and plant under the terms of his employment; that the defendants furnished him samples of clay and shale and information in regard to the capacity of the plant, facilities for transportation, etc., in order to aid him in effecting a sale; that the defendants, meaning both corporation and individual defendants, were kept advised at all times in regard to the progress of negotiations conducted by plaintiff to effect a sale, and that through the efforts and agency of the plaintiff alone, a sale was actually effected, either directly or indirectly, to the United States Brick Company of Reading, Pa., which plaintiff placed in direct communication with the defendants as a prospective purchaser by his letter of July 22, 1905.

The plaintiff also alleges that after the sale was thus procured through his agency, the transfer of the property and plant was consummated by the assignment of the capital stock of the corporation defendant, and that in consequence the individual defendants claim that no sale has been made as contemplated by his employment, and therefore refuse to pay him any compensation or give him any information as to the terms of sale, the purchase price, the names of the stockholders of the company, or the number of shares held by each.

If the corporation defendant and individual defendants, as alleged in the bill, recog-

nized and treated the plaintiff as their agent to effect a sale of the property and plant of the corporation, then the relation of principal and agent was established, and the refusal to give the agent information which he alleges has been withheld, is apparently a violation of duty on the part of the principal.

The plaintiff is entitled to be informed as to what his principal did in the making of a sale or transfer of the corporate property to the prospective purchaser, introduced by the plaintiff. He requires this information in order to ascertain and fix his rights.

Under the circumstances we regard the plaintiff's case as one in which he does not have a full, complete, and adequate remedy at law.

The present case differs in its facts from the case of *Owens v. Goldie*, 213 Pa. 579, to which we have been referred by defendants' counsel. In that case the plaintiff had full information as to the amount of money received by the defendant which he claimed to recover by his bill. In the present case the information to which the plaintiff is in our opinion entitled, has been withheld, and we regard it as his right to have inquiry and discovery made in regard thereto. The corporation defendant and individual defendants are both alleged to have participated in the making of the contract with the plaintiff, and it is, therefore, in our opinion, proper to join them as defendants in the present case.

In our opinion no valid ground for demurrer to the plaintiff's bill has been assigned, and the several demurrers filed by the individual defendants are now overruled, and it is directed that the said individual defendants make answer to the plaintiff's bill within fifteen days from the filing hereof.

For plaintiff, *R. L. Jones and A. E. Brandt*.

For defendant, *Snodgrass & Snodgrass*.  
(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

### Court of Common Pleas, CRAWFORD COUNTY.

CONNEAUT LAKE ICE CO. v.  
RHOADES et al.

*Equity—Equity practice—Decree pro confesso—  
Setting aside decree—Discretion of court.*

A decree pro confesso may be set aside in the exercise of a sound discretion by the court where an answer setting up a proper defense has been filed and proofs are offered to show that the delay in asserting the defense had not been through fault or willful neglect.

No. 1 September Term, 1906. In equity. Motions for final decree, to vacate and strike off judgment pro confesso and for striking off order extending time for filing answer.

Opinion by THOMAS, P. J. Filed July 1, 1907.

There appear to be considerable irregularity and some misunderstanding of parties and attorneys in this case.

The original bill was filed July 26, 1906, and the injunction thereon granted was served July 28, 1906. It does not appear from any of the papers at hand that this bill was ever served. On March 11, 1907, an amended bill was filed by leave of court and served the same day, notice of filing which was accepted the same day by defendants' attorney. Upon this amended bill was endorsed the usual notice requiring an appearance to be entered within fifteen days, and an answer to be filed within thirty days.

It seems to be admitted by counsel that there were some negotiations among counsel with reference to certain matters that they hoped to agree upon in order to the more certainly determine certain legal rights in dispute, and after a failure to agree thereon, and when the time for taking a judgment pro confesso had arrived, such judgment was, upon April 11, 1907, taken. It seems that this fact, together with the failure of parties to agree upon the facts upon which an agreement was sought, was unknown to one of the defendants and one of his counsel, who lived without the county.

These facts are not brought upon the record by evidence, but were conceded upon argument, and may be taken into consideration by us in exercising our discretion upon matters within that discretion.

On April 27, 1907, one of the local counsel for defendants presented to us a motion to extend time for an answer for sixty days. No good reason was presented for doing so, and we inquired as to what had been done, and were informed that no judgment pro confesso had been taken, and because of the strenuous engagements of both defendants'

local counsel the extension of time was desired, and thereupon we granted the extension prayed for.

The case was put on the argument list and was duly reached on June 10, 1907, at which time plaintiff moved (orally) for a final decree, and presented to the court a form of decree which it was desired that we enter.

At the time of the calling of the case defendants moved, by paper filed, to have the judgment pro confesso vacated and stricken off, and plaintiffs' attorney moved, by paper filed, to strike off order of April 27, 1907, extending the time for filing the answer.

Since the argument defendants have filed an answer and also an affidavit as to the cause of delay in filing the same. The affidavit was filed June 18, 1907, and the answer June 22, 1907.

It seems clear to us that when this case was put upon the argument list, and when called, plaintiff was not entitled to a decree, for the very patent reason that there was an outstanding order of court giving defendants additional time for answering. It may well be that that order was improvidently made, but it was within our power to make such an order, and it must be gotten rid of before we proceed to a decree within the time given in which to answer.

The motions to strike off the order extending the time for an answer, and to strike off the judgment are, in our opinion, well disposed of by the filing of the answer in this case. That raises a defence that would warrant a court in setting aside a decree on a judgment pro confesso unless the delay in asserting it had been through fault or willful neglect, but from the affidavit filed and the statements of counsel on both sides we feel that we would, even under such circumstances, be warranted in setting the same aside and making an order to proceed upon the bill and answer to a final determination of the issue.

The judgment pro confesso only entitled the plaintiff to proceed *ex parte* and there is now an answer and an issue raised. The proceedings should be on bill and answer.

And now, July 1, 1907, the motion for a decree upon the averments of the bill is refused; the motion to strike off the order of April 27, 1907, is refused; and the motion to vacate and strike off the judgment pro confesso is granted, and it is ordered that proceedings be had in due form on the amended bill and the answer filed thereto.

[From J. D. Roberts, Esq., Meadville, Pa.]

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No. 34.

PITTSBURGH, PA., MARCH 4, 1908.

## Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

### RICHMOND & SON v. FRANCIS.

*Promissory note—Accommodation endorser—  
Set-off—Notice of—Affidavit of defense—Suf-  
ficiency of.*

The right of set-off can only be used where it is of such a nature that the jury can liquidate the amount in the ordinary way. Where defendant's claim is of such a nature that it requires a bill in equity for an account to properly adjust the rights of the parties, it cannot be used as a set-off.

No. 576 December Term, 1907. Rule for judgment for want of a sufficient affidavit of defense.

Opinion by FORD, J. Filed February 8, 1908.

Plaintiffs brought this action upon a certain promissory note made by the defendant payable to the order of A. Richmond & Son. It is expressly averred in the statement of claim that the plaintiffs endorsed said note for the accommodation of the defendant, and that they are the bona fide owners and holders thereof for a valuable consideration.

Neither the affidavit of defense nor the supplemental affidavit of defense deny that the plaintiffs were accommodation indorsers, nor that they are bona fide holders for value, but the defense attempted to be set up arises out of a prior and independent undertaking or agreement.

It being alleged that plaintiffs, who are contractors and builders, and defendant, who is a brick and stone contractor, entered into an agreement dated April 1, 1904, a copy whereof is annexed to defendant's supplemental affidavit of defense, whereby the plaintiffs employed and the defendant agreed to serve the plaintiffs as superintendent of

the bricklaying branch of the building business conducted by plaintiffs, and plaintiffs agreed to pay the defendant "over and above his weekly salary 33½ per cent of the profits derived from the bricklaying branch of the business . . . to be paid . . . as soon as possible after the entire job is completed, accepted and paid for."

Defendant avers that the plaintiffs have not paid him the full amount due and payable under said agreement and have in their hands moneys payable to him largely in excess of the amount of said note.

In the supplemental affidavit filed by the defendant it is alleged that plaintiffs submitted to him a statement of account between them and the defendant alleging that the same was taken from their books, but "said statement does not represent the true condition of the account between the parties but is false and fraudulent," and specifying certain particulars "amongst others" in which the statement of account is alleged to be incorrect and untrue. A copy of the statement of account is not annexed to the affidavit of defense, nor is sufficient of its contents disclosed to determine the status of the account, the balance unpaid or the effect on such balance, even if allowance be made for the errors and discrepancies claimed. The figures given are insufficient to enable the court to determine what, if any, balance be due defendant from the plaintiffs on account of their joint business or undertaking. The defendant has not shown that he has made diligent effort to inform himself as to the condition of the account and failed through no fault of his; if an inspection of the books and papers in the possession of plaintiffs was necessary, was demanded and refused, that fact should have been averred.

There is no allegation that the note sued on was given in the course of the joint business nor that it grew out of or was in any way connected therewith; but it is alleged by the plaintiffs and not denied by the defendant, that plaintiffs endorsed the note for the accommodation only of the defendant and defendant discounted the note and received the proceeds for his own use.

Defendant avers, that "pursuant to said agreement numerous contracts were taken

and completed between March, 1904, and the date of bringing this suit," in which defendant was entitled to his share—two-thirds—of the profits; but there is no averment that the joint business or undertaking has been settled or that a balance ascertained and found to be due by plaintiffs to the defendant. "A debt or damage which can be set off as an independent counterclaim must be such as a jury can find and liquidate in the ordinary way, just as if the defendant were a plaintiff suing in debt, assumpsit or covenant. But where the right of the defendant is only to call the plaintiff to an account and his demand is such as must be settled in an action of account rendered or by bill in equity for an account, it is not a proper set off. Considered as an allegation of set off, the averments of the affidavit are . . . ineffective to present judgment." *Appleby v. Barrett*, 28 Supr. Ct. 549.

Rule absolute.

For plaintiff, *J. Boyd Duff*.

For defendant, *Carpenter & Chalfant*.

## Court of Quarter Sessions,

WASHINGTON COUNTY.

### COMMONWEALTH v. McDERMOTT.

*Oleomargarine—Act of May 29, 1901, P. L. 327—Conviction—Second offense.*

On November 21, 1907, A was convicted of selling oleomargarine in violation of the act of May 29, 1901, and on the same day a motion in arrest of judgment and for a new trial were filed, both of which were decided adversely to the defendant on January 31st, following, and on February 10, 1908, he was sentenced. On December 11, 1907, A committed the same offense and was convicted under an indictment setting forth the violation of the act by reason of the second offense and first conviction.

Held, the motions for arrest of judgment and new trial that defendant's first conviction, within the meaning of the act, was, on November 21, 1907, and not February 10th, the date of overruling the motion in arrest of judgment and new trial, and that consequently defendant stood convicted under the second indictment.

No. 159 February Term, 1908. In re motion in arrest of judgment.

Charge: Selling oleomargarine made with ingredients to color it yellow so as to look like yellow butter. Second offense. Keeping the same in stock for sale. Second offense; and selling oleomargarine without wrapping it in a wrapper on which is stamped the word "Oleomargarine." The indictment containing three counts.

Opinion by McILVAINE, P. J. Filed February 21, 1908.

#### I. UNDISPUTED FACTS.

The defendant, M. McDermott, is a merchant doing business in the borough of Charleroi in this county. On June 6, 1907, and September 19, 1907, respectively, he had in his store for sale oleomargarine colored yellow so as to look like yellow butter, and on each of those dates made sale of some of this product, contrary to the provisions of the act of May 29, 1901. Informations were made against him before a justice of the peace and after hearing he was bound to appear at the next term of the court of quarter sessions to answer these charges. At the next term of court, which was the November term, 1907, the grand jury on the 6th day of November, 1907, returned two true bills against him in which the offenses indicated were charged. On November 21, 1907, the defendant being in open court, plead not guilty. A jury was called, the cases tried and on the same day it rendered a verdict of guilty in each case. On the same day the defendant's counsel filed a motion in arrest of judgment and also a motion for a new trial, which the court directed to be placed upon the argument list to be heard in due course. January 31, 1908, the court overruled the motion in arrest of judgment and also the motion for a new trial and directed the defendant to appear in open court on February 10, 1908, to receive his sentence. February 10, 1908, the defendant appeared and was sentenced to pay the costs of prosecution and a fine of \$200 on each of these convictions.

On the 11th day of December, 1907, the defendant, M. McDermott, again had in his store for sale oleomargarine colored yellow so as to look like yellow butter, and on the said December 11, 1907, did sell a quantity of said oleomargarine and did deliver it to the purchaser without having it wrapped in

a wrapper that had stamped on it the word "oleomargarine," as provided by the act of 1901.

On January 30, 1908, an information was made against him for keeping on hand with intent to sell the same, oleomargarine colored yellow so as to look like yellow butter, and also with selling the same. The information further charged that the defendant had been previously convicted at the November term of the court of quarter sessions of this county of these same offenses. It also charged him with selling oleomargarine and delivering it to the purchaser without having it wrapped in a wrapper on which was printed the word "oleomargarine."

On the 11th day of February, 1908 (the day after the defendant was sentenced for the first offense) the grand jury returned a true bill against the defendant charging him with the three offenses set out in the information—the selling of oleomargarine colored yellow to look like yellow butter and keeping it on hand for sale, being charged in the first and second count of the indictment as a second offense, the indictment setting out the record in full of the first conviction and the time that sentence was imposed. The defendant pleaded not guilty to this indictment and after trial was convicted in manner and form as indicted.

The defendant then filed two motions in arrest of judgment. The first motion is, that judgment be arrested on the first and second counts of the indictment for the reason that the defendant was convicted on an indictment charging the second offense, the said second offense being alleged to have been committed on the 11th day of December, 1907, in an indictment found on the 11th day of February, 1908, which was founded on an information alleging the second offense which was made before the justice on the 30th day of January, 1908. The second motion is, that judgment be arrested on the verdict of the jury as to the third count of the indictment for the reason that the court erred in refusing to quash said count on the ground that it contained alternative statements and did not therefore specify with what offense the defendant was charged; second, that the wrapping and cover alleged to have been around the pack-

age of butter or oleomargarine was not proven beyond a reasonable doubt to have been the identical paper wrapping and cover in which said butter or oleomargarine was wrapped at the defendant's place of business.

## II. QUESTIONS OF LAW.

The question of law involved in the first motion is whether or not a conviction by the jury on November 21, 1907, upon which judgment was entered on February 10, 1908, is sufficient evidence to warrant the defendant being punished for a second offense committed December 11, 1907, as provided by the 7th section of the act of 1901, the second indictment being found and tried on February 11, 1908. This section, among other things, provides "that any person who violates any of the provisions of this act shall also be guilty of a misdemeanor and upon conviction thereof shall be punished for the first offense by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than three months, or both at the discretion of the court; and upon conviction of any subsequent offense shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars and by imprisonment in the county jail for not less than six months nor more than twelve months."

The important words in this section as relate to the question before us are the words "upon conviction." What do they mean? Conviction has two meanings. The common meaning is "the finding of a person guilty of an offense," "the finding of a person guilty by verdict of a jury," "the legal proceeding of record which ascertains the guilt of a party and upon which the sentence or judgment is founded." It is clearly different from judgment, and that appears from the language used in this seventh section of the act of 1901, for it is plainly upon conviction that the judgment is to be pronounced. In other words, conviction is something that precedes judgment. Applying these definitions of the word "conviction" to the case in hand, did M. McDermott on December 11, 1907, when he committed the offense charged in this indictment, stand convicted of the same offense that he is now charged with committing? If the verdict of



the jury rendered on November 21, 1907, was a conviction, then he did stand convicted. On the other hand, if the judgment pronounced on the verdict of the jury on the 10th day of February, 1908, constituted his conviction of the first offense, then he was not guilty of committing a second offense on December 11, 1907.

After an examination of the authorities bearing upon this question, we are of opinion first, that it is necessary in an indictment against a person wherein the commonwealth seeks to have him convicted of a second offense, under the seventh section of this act of 1901, to set out in the indictment the record of his former conviction, and that that record must show not only a verdict of the jury but it must show that judgment has been pronounced or entered upon that verdict. We are also of the opinion that the conviction of the first offense must be before, in point of time, the second offense was committed, and that the record offered in evidence must show this. We are also of opinion that the record offered in evidence must show that a verdict of guilty by the jury was rendered before the time the second offense was committed; but we are not of the opinion that the judgment must have been entered on that conviction before the time of the commission of the second offense, but that it is sufficient if it has been entered before the indictment for the second offense was returned and before the trial was had on that indictment. In other words, the conviction of the defendant of the first offense in this case was on November 21, 1907. During the pendency of the motion in arrest of judgment that record could not have been admitted in evidence to sustain the second conviction for the reason it was not yet established whether the court would allow it to stand or not; but when the court, on January 31, 1908, entered its decree overruling the motion in arrest of judgment and the motion for a new trial and directed the defendant to appear for sentence on the 10th day of February, 1908, then that conviction became effective, and on February 10, 1908, when judgment was pronounced upon it it could no longer be questioned and more than that it became effective as of the date the verdict was rendered, for the laws delays

count for nothing. To state it in another way, we think the legal effect of the court's action upon a motion in arrest of judgment and sentencing the defendant on the 10th of February is just the same as though it had overruled the motions on the day they were made, to wit, November 21, 1907, the day the verdict was returned, and had then pronounced the sentence, and that being the case the record offered in evidence showed that there was a conviction of the defendant within the meaning of the act of 1901 prior to December 11, 1907, when he made sale for the second time of oleomargarine colored yellow so as to look like yellow butter and kept it in stock with intent to sell it; and this being so, the first motion in arrest of judgment upon the first and second counts of the indictment in this case must be overruled.

The defendant, on the 21st day of November, 1907, when a jury of his country returned a verdict of guilty, was put upon notice that a repetition of the offense by him under the provisions of the act of Assembly would call down upon his head a heavier punishment than could be inflicted for the first offense if he again offended. He could not, by his own action in filing a motion in arrest of judgment, do away with the effect of that conviction. In other words, he assumed the risk, if he sold the second time, of the court's overruling his motion and of making effective the finding of the jury by the pronouncing of judgment, and he certainly is not in a position now to say that his conviction was of date February 10, 1908, in place of November 21, 1907, and that he had no knowledge on December 11, 1907, that he stood convicted of the offense that he then was perpetrating.

The second motion in arrest of judgment on the third count, in our opinion is not well taken, for the reason that the word "or" as found in the indictment connects words used to describe the same thing. For instance, "oleomargarine or butterine" is two ways of describing the same article—the same product, and is a description taken as a whole. In other words, it is a dual description of one and the same thing and therefore is not objectionable as being a description of two different things in the dis-

junctive, so that the defendant could not know which was meant.

The second reason we think is not a reason that could be properly assigned in support of a motion in arrest of judgment, but rather would be more properly considered if there had been a motion for a new trial. If such motion, however, were before us, we do not think that the reason is well founded, as the testimony was of such a character as to warrant the jury in finding as they did.

And now, February 21, 1908, the defendant's motions in arrest of judgment came on to be heard, and were argued by counsel, whereupon, upon due consideration thereof, said motions are overruled and the defendant is directed to appear in this court upon Monday, the second day of March, 1908, for sentence upon the three counts of the indictment of which he stands convicted.

For commonwealth, *Alex Templeton* and *District Attorney Acheson*.

For defendant, *Underwood & Meloy*.

[From Harry Russell Myers, Esq., Washington, Pa.]

(Quarter Sessions, Washington County.)

**In re Application for License to Sell  
Vinous, Spirituous, Malt and Brewed  
Liquors, by Wholesale, by Retail and  
as Manufacturers.**

Nos. 1 to 71 inclusive of the License Court for 1908.

McILVAINE, P. J.

This court has heretofore so often expressed in writing its opinion as to the true interpretation to be given the license laws of this commonwealth that we had hoped that further labor in this direction would not this year be necessary, but the number of remonstrances and legal objections that have been filed make it necessary that we should file a written opinion indicating the views of the court on the various questions raised by those who have at this time objected to the granting of licenses.

The first question raised by the representative of the Anti-Saloon League who appears and objects to the granting of licenses in most of the applications that have been presented, is that the license laws of Pennsylvania are unconstitutional and ought not to

be enforced because they are contrary to the second section of Article 1 of the Constitution of Pennsylvania, which declares that this government was "instituted for the peace, safety and happiness of its people." This criticism of the license laws of the state is based on the theory that they legalize the manufacture and sale of intoxicating drinks and that such manufacture and sale was at common law, and before so legalized, a crime or public nuisance. This contention in our opinion rests upon a false assumption. Without any statute law to the contrary, the right to manufacture and sell intoxicating drinks would be as free and unrestrained as the right to manufacture any other article of commerce, and our license laws were not passed for the purpose of conferring such a right nor for the purpose of legalizing a wrong. They were passed by a legislature which recognized the existing right, but which also recognized that the excessive use of intoxicating liquors was a great injury to the community, and that their sale should be restrained and regulated for the purpose of lessening that evil; and they were therefore passed for the purpose of subserving the peace, the safety and the happiness of the people, and not to destroy the same. Whether or not this is the best way of lessening the evil that admittedly exists, or whether restraint and regulation is as good as the total prohibition of the manufacture and sale of liquor, is a question of public policy which this court is not empowered to decide; the Constitution leaves the decision of that question to the legislature, and it has spoken. It is unnecessary for us, however, to undertake to maintain by argument the constitutionality of the license laws of the commonwealth, as the Supreme Court of the United States and the Superior and Supreme Courts of the commonwealth of Pennsylvania have all passed directly upon the question.

In a license case reported in 5 Howard, 574, United States Reports, Chief Justice Taney says: "Every state, therefore, may regulate its own judgment and upon its own views of the interest and well being of its citizens. I am not aware that this has ever been questioned; and if any State finds the retail and internal traffic in ardent

spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether if it thinks proper. Of the wisdom of this policy it is not my province or policy to speak. Upon that subject each state must decide for itself."

The law as thus laid down by Chief Justice Taney over fifty years ago has been approved in many cases since decided by the Supreme Court of the United States, among them, *Gibbons vs. Ogden*, 9 Wheaton, 203; *Beer Company vs. Massachusetts*, 97 U. S. Report, 25; *Foster vs. Kansas*, 112 U. S. Report, 201; *Bartemeyer vs. Iowa*, 18 Wallace, 129; *Mugler vs. Kansas*, 123 U. S. Report, 623.

In one of the cases just referred to, Mr. Justice Greer makes use of this very emphatic language: "It is not necessary for the sake of justifying the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusive in the state is alone competent for the correction of these great evils, and all measures of restraint or prohibition of the sale of intoxicating liquors necessary to effect the purpose are within the scope of that authority."

In the case of the appeal of Hiram DeWalt reported in 8th Superior Court Reports of our state, at page 521, the decision of which was affirmed by the Supreme Court, the question of the constitutionality of our license laws was directly affirmed. A remonstrant in the lower court took the position that the applicant who was applying for a license to sell liquor at retail was asking the court to give him the privilege of establishing a common nuisance and that the law under which he was making his application was therefore unconstitutional—the same claim that is made here. The court below granted the license and an appeal was taken by the remonstrant to the Superior Court. The Superior Court in affirming the action of the lower court in granting the license said: The record in this case shows a petition in the form prescribed by the

statute, and an order granting the license after due hearing. As the evidence given on the hearing is not before us, the decision of the court upon the questions of fact raised by the remonstrance is not reviewable. And notwithstanding the very earnest argument of the appellant, who appeared in person, we see no reason to doubt the constitutionality of the law under which the license was granted. The power of the state to regulate the sale of intoxicating liquors, and, in exercise of that power, to authorize the granting of licenses to fit persons under such conditions as the legislature may impose is too well settled to be open to discussion." An appeal was taken from this judgment of the Superior Court to the Supreme Court, where, as we have said, the decree of the Superior Court was affirmed.

We take it that it is unnecessary, with these decisions before us, to further discuss the question of the constitutionality of the license laws of the commonwealth.

In addition to the general objection that all the license laws of the commonwealth are unconstitutional because offending against section 2 of article 1, it was objected that the act of 1897 under which brewers apply for their license is unconstitutional because its enactments are broader than its title. This objection, we think, is unfounded, and even if it were well founded and the act of 1897 was to be held unconstitutional it would still leave in force other act of Assembly previously enacted in 1891, which would become operative if the act of '97 was unconstitutional, under which a brewer would be entitled to a license.

The other objection, raised by the counsel for the Anti-Saloon League require us to construe and interpret the license laws of the commonwealth and to indicate the rules which should not only determine when a license should be granted and when refused, but also to determine what duties are placed upon the applicant whose license has been granted. In the first place it will be observed that these laws were not passed solely to raise revenue. They are not excise laws. They were enacted by the legislature of the state, as we have already said, in the exercise of its police powers to lessen and curb a recognized evil, to wit, the excessive use

of intoxicating liquors and the many dire consequences detrimental to society and good government that follow therefrom. This being the case, it follows, first, that the court in determining whether a license should be granted in any given case must treat the license laws as having been passed to restrain and regulate and not to encourage and foster the manufacture and sale of intoxicating liquors, so as to lessen the evils that would result from their unrestrained sale; and second, that he who receives a license under these laws should conduct his business having due regard not only for the express but to the implied restraints that these laws impose.

What, then, are some of the things that the court should consider in determining whether a license should be granted or not?

1. It should consider the form of the application. Has the applicant complied with all the requirements of the law? Is his petition and bond in due form; is the bond properly signed by a sufficient surety, and has he complied with the standing rules of the court touching the filing of his paper?

2. It should consider whether or not the applicant has a proper place to receive a license. The system of license laws now in force in our state divide the persons who may receive a license into three classes—the manufacturer, the dealer or wholesaler and the retailer. The manufacturer's class is sub-divided into brewers and distillers, and the retail class is sub-divided into hotel keepers and restaurant keepers. The court should see that each applicant is fairly within the class that his application puts him and that the business he proposes to conduct is what it purports to be. For instance, a person who applies for a license as a hotel keeper, should have "a hotel;" it should be a hotel in truth and in fact, a public house where strangers and travelers can be comfortably entertained and one that is necessary to accommodate the public. One who applies for a brewer's license should have a brewery; and one who applies for a dealer's or wholesaler's license should have a place or location at which there is a demand for a wholesale license, and the business he will do if granted a license should be principally

a wholesale business with the retailers, and not a retail business to consumers. Wholesale or dealer's license should not be granted where there is no wholesale trade with retailers and where there are retail licenses sufficient to supply the retail trade. It is true that one receiving a wholesale or dealer's license can sell to consumers, but that business should be merely incidental to the principal business which he is licensed to do, to wit, to sell as a wholesaler to the retail trade.

3. The court should be satisfied that the applicant is a man of temperate habits and good moral character; that is, a man who is opposed to the excessive or intemperate use of intoxicating liquors not only as applied to his own life but as well to the lives of others, and also a man who feels the obligation that is upon him to obey the laws of the state and to so conduct his business as not to unreasonably interfere with or annoy others in the enjoyment of their rights.

4. The character of the community in which the place sought to be licensed is located is to be considered by the court. Every community, or rather the citizens of every community, in reference to a license application, may be divided into three classes. First, those of so tender years and of such habits as to need the protection of the court in keeping them away from places where they would be tempted to a life of excessive drinking. Second, those who totally abstain from the use of intoxicating drinks and believe that their sale in the community would be a menace to society and a snare to those whom they would protect. And third, those who use intoxicating liquors as a beverage moderately and feel that they should be afforded a place where they can conveniently be accommodated when they desire a drink. The court in determining whether a license should be granted must have due regard to each of these classes and try so far as possible to treat them all fairly. To illustrate: If a license were asked for in a location where the entire population was composed of school children or persons of known intemperate habits it would be the duty of the court to refuse the license at such a place and to keep the temptation to drink from being thrust in the very face of those who

are not able to protect themselves. For this reason licenses have been refused because the place sought to be licensed was located in close proximity to a school house, and licenses have been refused because a large percentage of the population of the immediate community where the license is applied for was given to the habit of excessive drinking, and because a licensed place in such a community would be sure to result in frequent scenes of disorder. Again, in a community where everybody is a total abstainer there would be no necessity to grant a license to accommodate the public, and a case of that kind would be easily disposed of. It is where the class of adults who drink in moderation and the class of adults who do not drink and fear the presence of a saloon as a source of evil are nearly equally divided in a community that the court has trouble in disposing of an application so as to be fair to both sides. Where supplemental petitions for and remonstrances against a license have been filed as provided by law, the act of assembly provides that the court shall not only consider the evidence that has been produced in court for and against the license, but shall have due regard to the number and character of the petitioners for and against the license. In this we see a purpose on the part of the legislature to recognize and to have the courts recognize the principle that public sentiment on the question of license or no license in any given community, properly expressed, should control. This court has always considered the law allowing remonstrances and supplemental petitions to be filed as meaning that a license should be refused in all cases where the court, from the evidence and having due regard to the number and character of the petitioners for and against the license, was of the opinion that the license was not necessary to accommodate the public as constituted in that community. In other words, this court has never forced a saloon or licensed place upon a township, borough or ward where it was made manifest in court in the way pointed out by the act of assembly that the weight of public sentiment among the adult population was that there was no necessity for a licensed place to accommodate the public as constituted in that

township, borough or ward.

5. Where the evidence produced in court shows that licensed places are necessary to accommodate the public, the number to be granted within any township, borough or ward is to be determined and should be limited by the court to the minimum number necessary to accommodate the public.

We say minimum number for the reason that the purpose of the act as expressed in its title is to restrain the sale of liquor and not to encourage the same by the multiplication of places where it may be had.

6. Where an applicant has a license and is seeking a renewal, the manner in which he has conducted his business and his attitude towards the law under which he holds his privilege is always a matter for consideration. The law, as we have already intimated, imposes upon one receiving a license at the hands of the court certain obligations. Some of these are express and some are implied. It is expressly provided that he shall not sell to minors nor to men of known intemperate habits nor to a person visibly affected by intoxicating drink, nor on Sunday, nor on the day of an election; nor shall a retailer sell on credit nor to any person on a pass book or on an order on a store or in exchange for any goods, wares, merchandise or provisions. But in addition to these express obligations he has implied obligations to meet. These may be summed up by saying that he is to conduct his business so as to accomplish what the legislature intended when it enacted the law under which he holds his privilege, and that is to restrain and curb the evils growing out of the excessive use of intoxicating drinks. Excessive drinking, rowdyism, disorder, gaming for the drinks and all practices resorted to to entice customers or stimulate drinking, such as bar room music and a free lunch of food and condiments which give an appetite for intoxicating drinks, should not be tolerated. He should employ as bar tenders temperate men—men in sympathy with the requirements of the law, men who discountenance intemperance and drunkenness and whose natural inclination would be to obey the law strictly. In short, he should keep a place for the accommodation of those who use intoxicating liquors moderately and temper-

ately, a place that will not be, to use the language of the street, "wide open," but "with the lid on."

7. What we have just said applies especially to those who are applicants for a retail license; but the spirit applies also to those who apply for license to sell by wholesale; they too have implied obligations resting upon them, they must not forget that they too are to avoid doing those things which directly provoke excessive drinking, disorder and annoyance to the public. For instance, no brewer or distiller or wholesaler should sell and deliver liquors to those who are engaged in keeping a speakeasy, or to drinking and gambling clubs, or to parties who congregate in the open to drink and carouse, to the annoyance of orderly citizens, or to those who are in the habit of drinking to excess, and no liquor should be delivered at industrial plants to be indiscriminately distributed by irresponsible agents among those who on account of drunkenness give trouble to their employers and are the cause of much disorder, and who, on account of their drinking, are disabled to do efficient work for their employer. All employees of the holders of licenses, engaged in their business, should be men of temperate habits, who not only respect the law but who recognize the fact that they are conducting a business, although lawful, yet one that is at least the indirect source of great annoyance to many people and does much evil, and that the law that permits the business requires it to be prosecuted so as to do the least possible evil. A man in any branch of the liquor business under a license from the commonwealth should recognize the fact that he is in a business that the law does not foster and encourage, but only tolerates on certain conditions, and that to him, above all others, applies the rule that every one must conduct his business so as not to unnecessarily and materially interfere with the rights of others or with the peace and good order of the community. Many evils and crimes have been laid at the door of the American saloon as known in the history of the past, and one of the objections made to a high license law, such as the Brooks law, by many good men and women as has been done at this license court, is that such a law legalizes that which

is wholly evil and is therefore against the spirit of our constitution. Great weight would be added to the contention of these good people if we were to construe our license laws as sanctioning or legalizing these evil practices, but as we construe the law the purpose of the legislature was exactly the contrary. The legislature, recognizing these evils of which these good people complain, sought to restrain and regulate the sale of intoxicating drinks so as to minimize them as far as possible, and upon the persons to whom are granted licenses is placed the duty of bringing in a new order of things, that is, of running a place and business that will not be the source of well founded complaint upon the part of good and orderly citizens of the community where the business is carried on.

Hoping that each of those who has been granted a license at this time will adopt the court's interpretation of the laws under which these licenses are granted, and that they will act in harmony with the better element of the respective communities in which they live and bring about a diminution rather than an increase of drunkenness and disorder, we may conclude this opinion by saying that we have considered each application carefully and separately and all the evidence and petitions that have been submitted at the hearing in support of and against the same, and applying the rules of law to which we have referred as being deducible from a proper construction of the license laws to the facts that were developed in each particular case at the hearing and the facts that were within our own personal knowledge, we have granted or refused each separate application as hereinafter set out.

We would say further that we have arranged that each person who has been granted a license shall receive a printed copy of the foregoing opinion for his information and guidance.

[From Harry Russell Myers, Esq., Washington, Pa.]

In re Crenshaw, 19, Am. B. R. 266, holds that an alleged bankrupt prior to adjudication may not be required to submit to an examination under section 21 of the Bankruptcy Act touching his acts, conduct or property.

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**Book Notice.**

THE LAW OF CRIMES IN PENNSYLVANIA INCLUDING CRIMINAL EVIDENCE. By WILLIAM TRICKETT, LL.D. T. & J. W. JOHNSON COMPANY, Philadelphia, Publishers. MRS. LYDIA C. WOLFF, Agent, 510 Fourth Avenue.

This treatise is a work on the substantive law of crime in Pennsylvania. The more than two thousand cases consulted in its preparation indicate the copiousness of its sources. Since there is a close connection between the components of a crime and the proofs of their existence, points of evidence, developed in the examined decisions, have not been ignored. The discussion of the various forms of homicide—extending over two hundred and twelve pages—will be found complete. Other somewhat difficult crimes, painstakingly treated, are larceny, false pretences, malicious mischief, nuisance, illegal sales of liquor, conspiracy, libel, assault and battery. Two chapters are devoted to the important topic of insanity, and a third to intoxication as affecting responsibility. Other valuable features of the work are its discussions of various evidentiary subjects, such as circumstantial evidence, confessions, character evidence, dying declarations, the alibi. In addition, threats, motive, proof of other crime, flight, preparation, photographs, former testimony of witnesses, etc., have been treated.

Mr. Trickett's works on Pennsylvania law are well known and have an established reputation, and this is one of his best. Criminal Law in Pennsylvania is in two volumes, printed in good, large type, with the usual excellent index of subjects and statutes.

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In Matter of Back Bay Automobile Co., reported 19 Am. B. R. 33, it is held that a composition can be effected before as well as after adjudication.

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In matter of Rose, 19 Am. B. R. 169, it is held that a creditor, though he has not proved his claim, is entitled to an order for the examination of the bankrupt section 21 of the Bankruptcy Act.

In matter of Creasinger, 17 Am. B. R. 538, it has been held that an attorney at law is not bound to continue in the employment of a client who refuses to follow his advice, and an abandonment of the case is no defense to a claim for professional services already rendered, against the former client's estate in bankruptcy.

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The United States Court of Appeals, Third Circuit, has held, in *Brown & Adams v. United Button Co.*, 17 Am. B. R. 565, that a claim for unliquidated damages, resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not a provable debt in bankruptcy.

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The case of *In re T. E. Hill Co.*, reported 17 Am. B. R. 517, holds that a corporation engaged solely in the business of constructing, under contract, piers and abutments made of concrete, mixed as the work progresses, for railroad bridges, including the work of clearing the foundations, building cofferdams and driving piles for the work, may not be adjudged bankrupt.

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In *Morning Telegraph Pub. Co. v. Hutchinson Co.*, reported 17 Am. B. R. 425, the Supreme Court of Michigan has held that the filing of a petition in bankruptcy confers no summary jurisdiction over property transferred to and in possession of a trustee for certain creditors, who, as an adverse claimant, is entitled to be heard before he can be deprived of his possession, and an action for replevin by a third person may be maintained in a state court to recover possession of a portion of the property so transferred.

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In *Matter of Hart & Co.*, 17 Am. B. R. 480, it has been held that the words of section 2, division 5, Bankruptcy Act, allowing trustees "additional compensation" for such service, do not authorize the allowance of other compensation than the fee and commission provided for compensation of trustee in section 4a of such act; that the "additional compensation" for conducting the bankrupt business as a going concern is realized by the allowance of commissions on the disbursements made in such conduct of the bankrupt business as well as on other disbursements.

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No. 35.

PITTSBURGH, PA., MARCH 11, 1908.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### KENNEDY v. MERRITT et al.

*Service—Setting aside—Inducing defendant to come within the jurisdiction.*

Defendant came to Pittsburgh in response to a telegram from a syndicate of which plaintiff was a member, to continue certain negotiations. After the business was completed a writ was served on defendant in a suit brought by plaintiff, and the court refused to set the service aside.

The facts did not show anything to rebut the presumption that defendant was in good faith induced come within the jurisdiction of the court.

No. 526 April Term, 1907. Rule to set aside service of summons.

Opinion by YOUNG, J. Filed December 13, 1907.

One of the defendants, Alfred Merritt, came to the city of Pittsburgh on February 7, 1907, in response to a telegram sent him by a certain syndicate, of which plaintiff was a member, for the purpose of continuing negotiations relative to the purchase of certain ore lands, in the sale of which Merritt was interested. After the business for which Merritt had come had been completed, the plaintiff and Merritt went to the office of plaintiff for the purpose of talking over certain other business matters, and it having been found that certain papers in the possession of the plaintiff, and which were necessary to the discussion, were not present, it was agreed by the plaintiff and Merritt that they should meet later in the day. Thereafter plaintiff attempted to discuss with Merritt a claim he had against Merritt. The defendant, Merritt, said to plaintiff, "I will not pay you anything unless the court says so." The plaintiff then caused a summons to be issued and served upon Merritt.

It is claimed by counsel for Merritt that he was brought into the jurisdiction by deception and for the purpose of serving him with the writ. This the plaintiff denies, and testimony has been taken upon the question. The rule has been laid down in this court in the case of *Harbison-Walker Refractories Company v. Fredericks et al.*, 12 District Reports 419, in these words:

"Abuse of legal process has always been disapproved of by our courts, and whenever it has been made to appear that the service of a writ has been accomplished by false representations made to, or deceitful contrivances practiced upon the defendants, such service has universally been set aside;" and there is no doubt that this is the law.

It is equally true, as said by Mr. Justice Clifford in the case of *Union Sugar Refinery Company v. Mathieson*, 2 Cliff (U. S.) 304, "where there is no false representation and no deceptive contrivance and no wrongful act of any kind done by the plaintiff, or by any other person in his behalf, to entice, inveigle, or induce the defendant to come into the jurisdiction where the plaintiff resides for the purpose of serving him with process, it is competent for the plaintiff to sue out process and have it served." In this case the evidence fails to satisfy us that the plaintiff intended at the time the telegram was sent to Merritt to bring him into the jurisdiction for the purpose of serving the summons upon him. It is true that he was a member of the syndicate who desired the presence of Merritt in the city, but there is no evidence in this case whatever that would bring us to the conclusion that at that time the plaintiff intended to bring his suit or serve the defendant, Merritt, with process. The case does not come up to the standard fixed in *Columbia Placer Co. v. Bucyrus Co.*, 60 Minn. 142, and cited by defendant's counsel, where it is said:

"While fraud is never to be presumed, in the absence of evidence, yet when the defendants established the facts herein referred to, which are practically admitted, a clear and positive prima facie case of an attempted fraudulent service of process was made out, and the plaintiffs were bound to overcome it, not simply by a general denial of fraud and a general allegation of good faith, but



by showing affirmatively their good faith in inducing the defendants' general manager to come within the jurisdiction of the court."

The facts of this case do not warrant us in concluding that there was either fraud proved, or such a state of facts from which fraud could be inferred and so making out a clear and positive *prima facie* case of an attempted fraudulent service of process, so as to put the burden upon the plaintiff to overcome it.

The rule must therefore be discharged and the service allowed to stand.

For plaintiff, *Weil & Thorp.*

For defendant, *R. W. Martin.*

### Court of Common Pleas,

WESTMORELAND COUNTY.

#### FOSTER, for use of MERCHANTS' TRUST CO., v. ALLSHOUSE.

*Judgment — Opening judgment — Forgery — Competency of witness — Evidence.*

A note to the order of the payee with warrant of attorney to confess judgment, etc., was assigned to the use plaintiff prior to the payee's death and after his death, the use plaintiff had judgment confessed thereon. The judgment having been opened, on the trial of the issue framed to determine whether the name of an obligor on the note had been forged, it was held that the obligor was incompetent as a witness under clause e, section 5 of the act of May 23, 1887, P. L. 158, to show the forgery of his name.

No. 173 November Term, 1905. Motion for new trial.

Opinion by McCONNELL, J. Filed October 28, 1907.

The third, fourth and fifth reasons for a new trial may be dismissed inasmuch as there is no adequate basis for granting a new trial on account of anything referred to therein.

If there was such argument made, as is asserted in the second reason, the mode for correcting it is prescribed by rule of court. By pursuing that course the unauthorized argument, if made, could have been corrected before the jury retired. The court would

not now on that account be warranted to grant a new trial.

The only reason that requires any extended comment is the first one, which reads as follows: 1. Because the learned judge erred in rejecting John W. Allshouse, the defendant, as a competent witness to prove that he did not execute and deliver the note, and that he did not authorize or empower any other person or persons to execute and deliver the same for him.

The things which the defendant offered himself as a witness to prove constituted the whole issue to be tried. The issue was, by the court, ordered to be framed so as to put those matters in issue, and it was so done. The jury has disposed of that issue, in a manner unsatisfactory to the defendant. There can, therefore, be no question about the materiality of testimony of that import, if the witness was competent to give it. If he was competent, a new trial should be granted—if he was not competent, a new trial should be refused.

In order that we may distinctly have in mind facts that are in no wise disputed, we here recall that the obligation which the plaintiff claims binds the defendant—together with the assignment endorsed thereon—is in the following form, viz: "Greensburg, Pa., September 8th, 1905. Four months after date, I, we, or either of us, promise to pay to the order of W. H. Foster at the Merchant Trust Company of Greensburg, Three Thousand (\$3,000) Dollars without Defalcation, Exemption or stay of execution, Value Received.

"And further we do hereby empower any attorney of any Court of Record within the United States, to appear for us and confess judgment against us for the above sum, with costs of suit and attorney's commission of five per cent for collection and release of all errors, and without stay of execution, and inquisition upon any levy on real estate is hereby waived, and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived and no benefit of exemption to be claimed under and by virtue of any exemption law now in or hereafter to be passed.

"W. H. FOSTER,

"W. B. CROUSHORE,  
"E. L. WOOLSEY,  
"J. W. ALLSHOUSE."

W. H. Foster had this note discounted at the Merchant's Trust Company and assigned it by virtue of the following endorsement thereon, viz.:

September 8th, 1905.

"For value received I hereby sell, assign, transfer and set over this note and all moneys secured thereby to Merchant's Trust Company of Greensburg, and guarantee payment at maturity.

"W. H. FOSTER."

On September 19, 1905, the Merchant's Trust Company caused judgment to be entered against all the obligors of the note, in strict conformity to, and by virtue of the foregoing warrant of attorney.

About September 15, 1905, J. W. Allshouse received a letter from the trust company informing him that it was the holder of the foregoing note. Prior thereto, it had had no dealings or communications whatever with J. W. Allshouse. Its only negotiations with respect to the note had, up to that time, been with W. H. Foster, who received the proceeds of the discounted note—leaving a portion thereof on deposit to his own credit, with the trust company, until it was lifted by his legal representative after Foster's death—which event occurred in September, 1905, on some day subsequent to the 8th and prior to the 15th—the exact day being not more precisely fixed.

The trust company received no reply to its letter, and J. W. Allshouse did not personally or in any other way, communicate with it, in respect to the note, until he presented his petition to court, on December 18, 1905, and obtained the rule which resulted in the framing of the pending issue—although from the jurat thereto, it would seem that the petition was sworn to by him on September 30, 1905. In substance the petition alleges the forgery of petitioner's name to the note.

That his name was on the note when it was presented to the trust company is not a matter of dispute.

On the trial of such an issue, W. H. Foster being dead at the time of trial, was J. W. Allshouse, the defendant, a competent

witness in his own behalf to testify to the facts proposed in the offer, these facts having relation to matters occurring before the death of W. H. Foster?

The answer to that question should be made after a consideration of the effect of clause e, section 5 of the act of May 23, 1887, P. L. 158.

That act makes competency the rule, incompetency the exception. "Clause e" defines an exception to the rule of competency established by the act, as follows: "Nor where any party to a thing or contract in action is dead and his right thereto or therein has passed either by his own act or by the act of the law to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased party be a competent witness to any matter occurring before the death of said party, etc."

The note in question represents a contract with J. W. Allshouse. The other party thereto is represented in the note to be W. H. Foster, who is now dead. The decedent's right therein or thereto had in his lifetime passed by his own act to the trust company, a party on the record, which herein prosecutes against the defendant the apparent right of the decedent, the point in controversy in the issue being the question of the forgery of the defendant's name to the note.

J. W. Allshouse is the remaining or surviving party to that thing or contract. The provision seems to declare in terms his incompetency.

If the trust company is not the representative of the right of W. H. Foster disclosed in the note, who does represent it, and by what means did he become the representative of it?

If the trust company has any right at all to the note, it has taken that right solely through the act of assignment of it made by W. H. Foster, which act of assigning the obligors, have, by terms of the note, apparently at least, authorized, inasmuch as the note is made payable to the order of W. H. Foster, the payee. J. W. Allshouse had no contract relation with the trust company

outside of that relation into which he has apparently been brought by the assignment of the note, on which his name appeared, by W. H. Foster in his lifetime. If J. W. Allshouse entered into that contract relation with W. H. Foster which that note represents, the trust company as the assignee of W. W. Foster, is entitled to enforce it. If he didn't enter into that contract relation with W. H. Foster, the trust company is not entitled to enforce it. The witness offers himself to disprove what W. H. Foster, by his conduct, obviously asserted before his death. Death has now precluded W. H. Foster from giving testimony with respect to the thing now in dispute, and the spirit of "clause e," is to effect equality between the parties to the contract by requiring that the surviving party thereto be precluded from testifying also. The question now in dispute has its incipency wholly in matters occurring, or alleged to have occurred, in the lifetime of W. H. Foster with respect to an indispensable requisite to the validity of the note which he subsequently transferred to the use plaintiff now on record, asserting the apparent right of W. H. Foster.

If we had before us a question about the ownership of the money left in the trust company's custody at the death of W. H. Foster; it being asserted by the administrator of Foster that it had come from Allshouse in discharge of a debt to Foster, but Allshouse asserting that it had come from him to Foster simply to hold it as a custodian or trustee for Allshouse, we would not have a question more completely between Foster and Allshouse than we have. It is not asserted here that Allshouse gave Foster money in his lifetime, but it is asserted that he gave him a marketable obligation which was, by its terms, convertible by Foster into money and with the design that it should be so done. In the supposed case of Foster's having gotten money from Allshouse and Allshouse's asserting that he had gotten it only as a trustee, no one would think that under "clause e" Allshouse (Foster being dead) could testify about the character of the transfer of the money. Why should the law be different when the thing alleged to have been transferred is not money but a

thing convertible into money?

The case comes so literally within the terms of "clause e" that the natural inquiry is: if J. W. Allshouse is not precluded by "clause e," why is it that he is not?

In answer to that inquiry, counsel now, and at the trial, cite three cases, none of which meet our question, as we shall endeavor to show.

(1) *Dickson v. McGraw*, 151 Pa. 98. That case decided that "to exclude a witness on the ground of interest, it is necessary he should have a vested interest, not in the question, but in the event of the suit."

The action was ejectment. The proposed witnesses were Candis M. Dickson and Henry Dickson, her husband. The subject in controversy was a leasehold once owned by Candis M. Dickson. This leasehold had been levied on and sold by the sheriff to John A. McGraw, who was dead at the time of the trial, but who, in his lifetime, had assigned his interest to his mother, who put the defendants in possession.

In 1890 the same leasehold was again sold by the sheriff on a judgment against Candis M. Dickson and was purchased by Mary E. Dickson, who brought the ejectment, alleging that the first sheriff's sale was fraudulent and void as against the creditors of Candis M. Dickson. To prove her charge of fraud the plaintiff offered as witnesses Candis M. Dickson and her husband, and, on objection, the court below excluded them as being incompetent witnesses, John A. McGraw, the other party to the alleged fraud, being dead. But it was held by the Supreme Court that the witnesses were competent to prove their own fraud, and that they "not only had no 'adverse interest,' but had no interest at all in the event of the suit; and were therefore competent witnesses."

Has J. W. Allshouse an interest in the event of this suit? To ask that question is to answer it in the affirmative. He is, therefore, not circumstanced as were the proposed witnesses in *Dickson v. McGraw*, and that case has no pertinency to the question under consideration. Allshouse has an interest adverse to the right of the deceased payee on which recovery is sought.

(2) *Bank v. Henning*, 171 Pa. 399. This is the case mainly relied on by the defend-

ant. What the case decides can only be known from keeping in mind the facts of the case, for we are not here permitted to employ language relating to those facts, as if it was predicated on the facts now before us, which facts are essentially different therefrom. The payee in that case was not, as in this, dead. It was a copartner, who was the defendant in the case, or one who, at one time, had been a copartner, and who, without authority, had signed the firm name to the note in suit; and the case was being prosecuted against the defendant as the surviving partner of the firm. It was decided in that case that "in an action against a surviving partner of a firm consisting of two persons, on a note signed with a firm name, the surviving partner is a competent witness to prove that the partnership had been dissolved before the date of the note, and was not in existence when it was given; that neither the defendant nor the partnership received any value from the note; that the note had not been signed by the defendant, or by anyone authorized to sign the firm name to it; and that the other partner had borrowed for his own benefit, after the dissolution of the firm, the money for which the note was given."

Mr. Justice Mitchell, speaking for the court, said: "Henning was a competent witness. He was not within the exceptions in clause e of section 5 of the act of 1887, nor where any party to a thing or contract in action is dead . . . and his right therein had passed . . . to a party on the record who represents his interests . . . shall any surviving party to the thing or contract . . . whose interest shall be adverse . . . be a competent witness," etc.

The rights of the alleged partner, deceased, had not passed to the plaintiff. It did not represent his interest in the note in suit, but was claiming adversely against his interest as well as against Henning. Nor was Henning's interest adverse to that of his deceased partner in this suit. The note was sued on as a firm note. Henning was called upon to testify that it was not made by the firm, and therefore his testimony was in exoneration of both partners so far as the present action was concerned. If the interest of the deceased partner should be inciden-

tally affected by the testimony, not as a partner, but by virtue of an individual act in another capacity, that would not render Henning incompetent. The interest of the deceased would be in the question, not in the immediate result of the suit. His representative was not party to the suit, and the judgment could not operate upon his rights one way or the other.

There is no mistaking the meaning of this clear language, nor the facts to which it applies. But, in our case, it is the payee in the note that is dead instead of a supposed coobligor. That fact differentiates our case from the adjudicated case in at least seven particulars. The following things that did not exist in the adjudicated case, do exist in our case, viz.:

(1) The rights of the decedent have passed to the plaintiff.

(2) That plaintiff does represent decedent's interest in the note.

(3) It is claiming to exercise his rights in the note against the defendant.

(4) Allhouse's interest is adverse to the interest of the decedent, which interest is now represented by the trust company.

(5) The proposed testimony of Allhouse would not be in exoneration of the decedent.

(6) The decedent, or his representative on the record, is interested in the result of the suit and not simply in the question.

(7) The representative of W. H. Foster (the trust company) is a party to the suit, and the judgment rendered therein will most materially affect the interest it represents.

The want of the seven things enumerated in *Bank v. Henning*, as justifying the ruling in that case, does not exist here; for those things are present in this case to make that ruling inapplicable, and to leave the case within the literal terms of "clause e."

(3) *Strause v. Braunreuter*, 4 Super. Ct. 263. In that case it was decided that a widow was a competent witness in a suit against her alone, on a note signed by herself and her husband, to show that she was a mere surety on the note. In this case, as in *Bank v. Henning*, it was not the payee of the note that was dead, but a coobligor with the proposed witness, and the witness alone was the defendant in the suit then on trial.

Judge Rice, delivering the opinion of the court, says: "By clause e, the disqualification is made to depend, not only on the fact of the witness being a surviving or remaining party to the thing or contract in action, but also on the fact of his having an interest adverse to the right of the deceased party, which right has passed by his own act or the act of the law to a party on the record who represents his interest in the subject in controversy. The deceased party to the contract in action was Adam Braunreuter, but his right had not passed to a party on the record who represented his interest. The issue was between Joseph Strause and Elsie Braunreuter. The legal representative of Adam Braunreuter was not a party to the record, and the testimony which the defendant proposed to give related to matters occurring between her agent and the agent of the living plaintiff, and concerning which he had testified fully at the instance of the plaintiff.

"The estate of Adam Braunreuter may have been interested in the question being tried, but not in the immediate result of the suit. There is wanting, therefore, one of the essentials necessary to bring the case within the exception."

It is obvious, without again repeating the reasons given with respect to the case *Bank v. Henning*, that the case of *Strause v. Braunreuter* lays down no doctrine that aids the defendant here. No case has been cited in his behalf wherein an obligor in a note was permitted to testify, the payee being dead at the time of trial.

If the only relation which W. H. Foster sustained to this note was that of a coobligor with J. W. Allshouse, there being a living payee, foster's death would have no potency to exclude J. W. Allshouse from testifying in a suit brought by that living payee or his assignee against Allshouse.

The cases of *Bank v. Henning*, and *Strause v. Braunreuter*, as well as the letter of the statute, show that. But the trouble about this case is that W. H. Foster does sustain another relation to this note, and that relation is shown by his being a payee in the note, and it is that relation that gives him the right thereto or therein, "and enables him," by his own act, "to pass it" to a

party on the record who represents his interests in the subject in controversy. His relation as coobligor gives him no such right or power. The thing that is thus passed is a beneficial—not an onerous or prejudicial thing. The thing passed is "a right" (in a case like this), and not an obligation. His relation as payee is representative of "a right," but his relation as maker is representative of obligation only.

Because, within the sense of "clause e," W. H. Foster's relation as a coobligor with Allshouse will not make Allshouse a surviving party in a suit by a living holder of the note, W. H. Foster being then dead—it by no means follows that Foster's relation as payee in such a suit will not constitute Allshouse a surviving party so as to exclude him, by reason of the adverseness of his interest to that of the decedent. Allshouse is clearly the surviving party in the latter case, but he clearly is not in the former case, according to the cited decisions. The argument in support of the present motion ignores that distinction.

The case of *Bank v. Henning* shows that a surviving partner, in a suit on a partnership claim in which he is a defendant, and some living holder is plaintiff, is not excluded as a witness by reason of his copartner's death, because he has no adverse interest to that of the decedent, but would rather exonerate the estate of the deceased partner by the giving of his testimony in his own behalf. But in *Dick v. Williams*, 130 Pa. 41, where the payee was the decedent, a partner against whom judgment had already passed, and who was not nominally defending in the pending suit, was held incompetent to testify in behalf of his copartner, because, the suit being for an alleged partnership debt, the tendency of their witness's testimony was to show that the debt was not a partnership debt at all, but his own individual debt, and, therefore, by such showing he would not only exonerate his copartner, who was defending, but would relieve himself from the obligation of the existing judgment, for it could not stand except when supported by a partnership debt. He, therefore, as clearly as did the defending copartner, held an interest adverse to that of the deceased payee, and

their interests would both be affected by the judgment in the pending suit. Both defendants were incompetent. These cases may be taken to illustrate the distinction between the competency of a witness who survives a codefendant in a suit wherein a living holder of a note is plaintiff, and a case where the payee is dead and the victim is his survivor as a party to the contract.

The only interest that will disqualify is an interest adverse to the right of the decedent. *Rine v. Hall*, 187 Pa. 264; *Toomey's Appeal*, 150 Pa. 535.

In the case of *Long v. Spencer & Co.*, 78 Pa. 303, a note was drawn by a firm to their own order, endorsed by them to one of the firm, and by him endorsed to Cotrell. Cotrell died and the note was found among his papers, unstamped. It was held under the act of 1869, that the testimony of two of the defendants that the note was unstamped when passed to Cotrell, being as to a matter before his death, was inadmissible.

In *Sutherland v. Ross*, 160 Pa. 29, it was held that, "where the date of the acknowledgment of a deed is within the lifetime of the grantee, the grantor and his wife are not competent witnesses after the death of the grantee to testify that the deed was a forgery, and that on the day of the alleged acknowledgment they were not in the county specified in the certificate."

It is not possible to first try a case to see whether a proposed witness has a pecuniary interest in the event of the suit. The question of admissibility is determinable by the prima facie appearance of that interest. In *Decoursey v. Johnson*, 134 Pa. 328, a husband and wife joined in an assignment of a policy on the life of the husband for the benefit of the wife, and that assignee transferred the policy to another and died. In a feigned issue between the second assignee and the widow of the assured to determine the ownership of the proceeds, the widow was held incompetent to testify as to matters occurring before the death of the first assignee under Sec. 5 (e), act of May 23, 1887, P. L. 159. She proposed to prove by her own testimony that the first assignee was merely the agent of the second assignee who was the plaintiff in the feigned issue. Mr. Justice Sterrett remarks, p. 332: "From these and other

testimony it appeared that the policy in question was assigned by herself and others to Boyd (the first assignee) absolutely, and that more than a month afterwards he assigned it to the plaintiff. There was nothing on the face of the papers to indicate that Boyd, who was then dead, was merely an agent of plaintiff in procuring the assignment. On the contrary he appeared to be a principal in the transaction, and there was nothing to rebut that legal inference. . . Having assigned her policy to Boyd, who assigned the same to plaintiff in this issue, Mrs. Johnson was incompetent to prove any matter occurring before the death of her assignee and was therefore rightly excluded."

Of course, if Boyd in fact had been but the agent of the second assignee, who was still alive, the death of Boyd would not have affected her competency. But the question of interest for the purpose of determining her competency was properly determined by the prima facie appearance of the papers.

*Keemer v. Herr*, 98 Pa. 6, is another case in which appearances determined the question of competency. "A mechanic's lien was filed against two persons as owners. Subsequently one of them died and his administrator was substituted. On the trial the jury was sworn as to both defendants. The plaintiff offered himself as a witness with reference to the terms of the original contract, contending that he was not disabled from testifying by reason of the fact that the action was against an administrator, because said administrator was not a necessary party to the suit, decedent having been merely the agent of the codefendant in contracting for the building. This fact he also proposed to testify to. Held, that the name of the administrator, not having been stricken off the record, and the jury having been sworn to try the case against him, the plaintiff was incompetent to testify as to either of the points above stated."

In this case, W. H. Foster appears to be the payee. The present condition of the note was its condition in his lifetime and when it was by him assigned to the trust company. The thing to be determined in this issue is whether J. W. Allshouse did or did not execute and deliver this note to

Foster in his lifetime. The judgment is only opened for the ascertainment of that one fact. In this issue we have nothing to do with the question of the equitable rights of the parties to the notes among themselves. We have nothing to do with any question of liability as accommodation maker, or principal, or bail, or anything of that sort. Was the name of J. W. Allshouse forged to that note? If it was not, the question of how the obligation binds him needs not to be here followed up, for it was no part of the issue. The question to be tried is defined by the scope of the application which secured the opening of judgment. *Smith v. Hine*, 179 Pa. 260.

The forgery, which is the basis of the present issue, was committed, if committed at all, in the lifetime of W. H. Foster, the payee. J. W. Allshouse is not competent to testify with respect to that question because he has an interest adverse to the interest of the decedent now in the trust company's hands; which interest would be effected by the judgment in this case. The case falls so literally within the terms of Sec. 5, clause e, that to attempt to discuss the question is to obscure it; to interpret the section is to corrupt it. The only thing to be done is to apply it. We think there is no basis for a new trial laid in the first reason.

And now, October 28, 1907, upon due consideration, the motion and reason for a new trial are overruled, a new trial is refused, and judgment is ordered on the verdict on payment of the jury fee.

For plaintiff, *Keenan & Lvird*.

For defendant, *Byers & Snively*.

[From Wm. S. Rial, Esq., Greensburg, Pa.]

In re H. R. Leighton & Co., 17 Am. B. R. 275, holds that a company incorporated for the purpose of carrying on a general stock, bond, grain and brokerage business and promoting financial enterprises, etc., is subject to adjudication as a bankrupt.

Where, as in Massachusetts, a direct gift of corporate stock from husband to wife is invalid, In re Tucker, 17 Am. B. R. 247, holds that her loan of the certificates, endorsed in blank to him, creates no allowable claim against his estate in bankruptcy.

Where, a day or two before a bank closed its doors, the defendant, its teller, with knowledge of its insolvency, and claiming to be a creditor, pays himself, by cashing his own check drawn against the funds of the bank, it has been held, In re Plant, 17 Am. B. R. 272, that the transaction constitutes a preference recoverable by the trustee in bankruptcy of the bank.

Where the note of a third person, offered to a bank as collateral security for unmatured notes, on condition of an extension of the time of payment, is not accepted until after the filing of a petition in bankruptcy against its debtor, held, In re Duncan, 17 Am. B. R. 283, that a subsequent delivery of the note of the third person to the bank is not effectual to transfer the title, which, upon adjudication, passed to the trustee.

In re Screws, 17 Am. B. R. 269, holds that an application for additional compensation by a trustee in bankruptcy appointed in 1901, must be determined by the provisions of the Bankruptcy Act as they stood prior to the adoption of the amendatory Act of 1903, and he cannot be allowed, in addition to his fees, special compensation for services in investigating the bankrupt's disposition of property and the loss of his stock by fire.

Where, between the filing of an involuntary petition and the adjudication of an alleged bankrupt, creditors file a bill in equity to vacate alleged fraudulent conveyances made by the alleged bankrupt to relatives within the four months period, it has been held, in Horner-Gaylord Co. v. Miller & Bennett, 17 Am. B. R. 257, that the bankruptcy court, since the amendatory Act of 1903, has jurisdiction, and in its discretion may appoint a special receiver to take possession of such property.

A private club, admission to which is accessible to members only, is held, in Mosman v. Ft. Collins (Colo.) 11 R.A.A. (N. S.) 842, not to be a disorderly house because liquors are sold there in violation of a municipal ordinance.

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No. 36.

PITTSBURGH, PA., MARCH 18, 1908.

## Court of Common Pleas No. 4, ALLEGHENY COUNTY.

**Commonwealth ex rel. Campbell v.  
President, Secretary and Directors  
of the School District of the Twenty-  
Fifth Ward, Pittsburgh.**

*School directors—Ouster—Forty-fourth section  
of the act of February 12, 1869—Manda-  
mus.*

The notice of the first meeting of the school board was left at the residence of A, who had just been elected a school director, on the day of the meeting and while he was absent from the city, and he was consequently unable to attend. He presented his credentials at the second meeting, but was refused admission to the third by instructions of the board which had declared his seat vacant and elected another to his place on the ground of refusal to attend a regular meeting. On his petition praying for a writ of alternative mandamus against the members of the board it was held, that a proper construction of section 44 of the act of February 12, 1869, under which the respondents attempted to justify the ouster, and which provides for an ouster in case of the refusal of a member of the board to attend a regular meeting, did not apply to the present case as his failure to attend the first meeting did not amount to a refusal.

In this case there was no dispute as to the validity of the election of A, the only question being the legality of the ouster. Held, that mandamus was the proper procedure.

A return to a writ of mandamus must set forth all the essential facts required by the answer with distinctness and certainty.

No. 354 Fourth Term, 1907.

Opinion by COHEN, J. Filed September 16, 1907.

This proceeding is founded on a petition of J. E. Campbell as relator against the school directors of the school district of the

Twenty-fifth ward, Pittsburgh, praying for an alternative writ of mandamus against the members of said school board requiring them to give the relator full and free access to, and permit him to participate in the deliberations of all meetings of said school board; to which respondents made answer. This answer was demurred to, and issue was joined upon the demurrer. The question thus raised is whether defendants' answer is sufficient to prevent the relator from obtaining a writ of peremptory mandamus.

The petition alleges that relator was duly elected a member of said board of directors on February 19, 1907; the answer of respondents admits such election, so that there is no dispute as to the original title of petitioner to the office in question. The petition avers that a meeting was called for June 3, 1907, at 4 p. m., that notice of same was received at relator's home, 3223 Sidney street, at eleven o'clock on the morning of the day of the meeting, at which time petitioner avers that he was absent from the city and at Buffalo, N. Y., which fact petitioner alleges "was known to the other members of the said board," and that petitioner did not receive personally said notice until after the meeting. The relator further suggests in his petition that a second and special meeting of said board was held at 4 p. m. on July 1, 1907, that no official notice thereof was served on him, but learning of the meeting he, having been previously qualified by John A. Blackner, alderman of said Twenty-fifth ward, presented himself at said meeting and filed with the president his credentials entitling him to his seat as a member of said board of directors, and which credentials the board still retain.

Relator also avers that a third and special meeting of the board was held on July 8, 1907. That petitioner was informed by C. C. Hersman, one of its members, of the time and place of meeting; that petitioner at said time went to place of meeting and was "stopped at the gate and denied admittance to the building by John Jordan, Sr., janitor of the building, who stated he was acting under instructions of the board of directors." Petitioner finally gained admittance to the meeting, and then and there learned that the president of the board had



peremptorily declared relator's seat vacant "on account of non-attendance," and that the board immediately proceeded to appoint, and did appoint James Fouse to fill the vacancy, without giving petitioner an opportunity to prove that his absence from the first meeting was caused by his temporary absence from the city.

It was admitted at the argument of this case that the said appointee was a candidate for nomination at the primaries and defeated. Petitioner averred that the only meeting he was absent from was the first meeting held on June 3, 1907, at the date of which he was absent from city.

Respondents' answer does not deny the absence of relator from the city at the date of the first meeting, June 3, 1907, nor does it deny his attendance at the subsequent meetings of July 1st and 8th, 1907. It fails, too, to controvert relator's allegation that no official notices were given relator as to the times and place of the second and third meetings of the board, and utterly omits to respond to petitioner's allegation of his attempted exclusion by the janitor from the building at the third meeting, or "that such was done by the direction of said board," as stated by the janitor to petitioner, and as set forth in the petition.

Respondents justify their action in declaring relator's seat vacant and awarding same to Fouse, by virtue of the provisions of the act of assembly of February 12, 1869, section 44, providing, "That if any person elected school director shall refuse to attend a regular meeting of the board after having received written notice from the secretary to enter and appear upon the duties of his office, or if a person, having taken upon him the duties of his office as director, shall neglect to attend any two regular meetings of the board in succession, unless detained by sickness or prevented by absence from the ward, or to act in his official capacity when in attendance, the directors present shall have power to declare his seat in the board vacant, and to appoint another in his stead, to serve until the next annual organization of the board." The act is undoubtedly a wise one, beneficial to the interests of our public school system and well put into operation when one absents himself "from

two successive meetings unless detained by sickness or absent from the ward;" but surely it was never intended to apply when the director might on the occasion of even an organization meeting (where a majority of the board were present, as in this case) be unavoidably absent or sick, or prevented by any one of a thousand incidents of family or business exigencies.

The language of the section of the act referred to indicates there must be a *refusal* to attend a *regular* meeting, on the part of the director, who has not yet undertaken the duties of his office before his seat can be declared vacant, whilst as to the director who has taken upon him the duties of his office the act authorizes the board to declare his seat vacant, if he *neglects* to attend any two regular meetings in succession.

Was there a refusal in this case? We think not. Such refusal is not shown by the facts set forth in relator's petition, nor does respondents' answer allege any "refusal" on the part of relator; yet the resolution of the board adopted at its meeting, July 8, 1907, as set forth in respondents' answer avers that "relator's seat was vacated by reason of his having 'failed' to attend the meeting or to act as such director. 'Refusal' being the only cause for such removal under the terms of the act, the resolution vacating relator's seat was utterly illegal.

It might well be argued that a "refusal" to act may be implied as well as expressed. Even so, still such implication does not arise under the circumstances alleged in relator's petition and not denied by the answer. To the contrary, relator was anxious to perform the duties of his office and attended the second and third meeting; his presence at the second meeting was and should have been considered ample evidence of his desire to perform such, instead of which his seat was peremptorily and with "indecent haste" declared vacant and instantly supplied. Such action is neither within the spirit or meaning of section 8 of the act of assembly of 1854 or of the similar provisions of the 44th section of the act of assembly of 1869, P. L. 150. "The said acts are highly penal, in that they permit a few individuals liable to be governed by

personal feeling to oust by summary proceedings the officer duly chosen by the electors to represent them in their school matters. These acts must be strictly construed and every step in the proceeding must clearly appear to have been regular and within the power conferred by the statute. The writ of mandamus is not to seat the relator, but to compel the respondents to recognize his right." *Com. ex rel. v. Gibbons*, 196 Pa. 97. This investigation does not concern the title of James Fouse, the alleged successor of the relator, who was elected by the board to fill a vacancy that did not exist. Consequently Fouse is not entitled to notice of this proceeding, as claimed by respondents. See *Com. ex rel. v. Gibbons*, *supra*; also *Zulich v. Bowman*, 42 Pa. 83, the remedy by mandamus is clear on principle.

In this case there is no contest as to relator's original title to his seat under a valid election, but only as to the legality of his ouster. If this was not valid, he has never been ousted, and mandamus is the proper remedy to prevent his further unlawful exclusion. We have no concern with the title of his alleged successor. He was unlawfully elected by the board to supply an imaginary vacancy.

In *re Prospect Brewing Company's Petition*, 127 Pa. 523 (1889), it is said: "There is no form of pleading known to law in which greater certainty is required than in a return to a writ of mandamus. It requires not only the greatest possible certainty, not merely certainty to a common intent or certainty to a common intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular. The reason for this strictness is, that at the common law the return could not be traversed. However that may be now in some cases, the rule is practically the same in the present instance." Again: "A return to a mandamus must set forth distinctly and certainly, not argumentatively, inferentially or evasively, all the facts essential to the conviction, both as to the cause and mode of proceeding." *Society, etc., v. Com.*, 52 Pa. 125.

The return in the case at bar is neither certain or distinct and lacks all the elements

as tested by the decisions. In *Com. v. Allegheny County Commissioners*, 37 Pa. 277, the court says: "The facts relied on to justify the refusal to obey the mandate of the writ of alternative mandamus must be clearly and specifically set forth, with sufficient certainty, and not argumentatively, inferentially or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ." The facts alleged in respondents' answer are clearly insufficient, uncertain, vague, and do not constitute a violation of the law governing in such cases, by virtue of which the ouster can be justified or approved by the court.

Even though all the proceedings of the board preceding the ouster were regular, it is exceedingly doubtful whether the meeting of the board at which the ouster resolution was adopted was a meeting such as is contemplated by said act for the purposes of ouster. The language of the act of February 12, 1869, section 44, is "that the directors present (meaning at such organization meeting) shall have power to declare his seat vacant." No action was taken at such organization meeting, nor is there anything in the return to indicate that four members were present at the meeting of the board on July 9, 1907, when the ouster resolution was passed. Even though the date of such meeting was legal, unless four members were present no such ouster could be declared: *Buller Township School District Case*, 158 Pa. 165.

The case of *Caffrey v. Caffrey*, cited by respondents' counsel does not apply. That was a contest based on the claim of two contestants, each asserting his election by the people; but this is purely a question of ouster and does not affect relator's original title to the seat.

Where there is no contest as to a school director's original title to his seat under a valid election but only as to the legality of his ouster for alleged absence from meetings, the remedy of the director is mandamus to prevent his further unlawful exclusion. The remedy by quo warranto (as suggested by respondents' brief) against the person chosen to succeed him does not apply: *Com. ex rel. Gibbons*, *supra*.

The answer of respondents being insufficient for the reasons stated, the demurrer is therefore sustained and a writ of peremptory mandamus ordered to issue.

For relator, *E. E. Cotton* and *Robert E. MacConnell*.

For respondents, *Joseph McClure*.

(Common Pleas No. 4, Allegheny Co.)

### BRIGGS MACHINERY CO. v. THE THOMAS McNALLY CO.

#### *Affidavit of defense—Sufficiency of—Sale—Allegation of warranty.*

An affidavit of defense to a suit to recover the price of machinery sold and delivered to the defendant under a written contract which contains no warranty, is insufficient which alleges plaintiffs warranted the machinery to do certain work which it failed to do, but does not set out that the warranty was omitted from the contract by fraud, accident or mistake. In addition the defendant did not deny that it had received the machinery and retained it without tendering its return.

No. 371 First Term, 1908. Rule for judgment for want of sufficient affidavit of defense.

#### BY THE COURT.

In this case the plaintiff sued to recover the price of certain machinery sold and delivered to the defendant. These sales were upon written orders, copies of which are attached to the statement of demand, and said orders were accepted by the plaintiff. On May 14, 1907, the portable engine, and on June 10, 1907, the sawmill, and on May 28, 1907, the circular saw, were delivered to defendant. All of this machinery was, and still is, retained by the defendant.

The defendant, in an affidavit of defense, admitted the order for the sawmill and for the engine, but averred that the plaintiff "guaranteed" that said outfit was capable of cutting from 10,000 to 20,000 feet of lumber per day; and it admitted ordering the saw. The defendant then averred that the sawmill and engine were not of such capacity as guaranteed, and that the plaintiff delayed shipping the saw for twenty-two days. It is also averred that defendant has been obliged, by reason of the plaintiff's

failure to carry out the contract, to buy lumber elsewhere; and that defendant has been damaged \$5,000.

In a supplemental affidavit of defense the defendant averred that the agreement was "partly written and partly verbal;" that the plaintiff "warranted the said sawmill would cut or saw between 10,000 and 20,000 feet of lumber per day;" that the plaintiff delay shipment thirty days; that said sawmill was not nearly of the capacity aforesaid, and that defendant was obliged to buy lumber in the open market and was thereby damaged.

It will be observed that there is no denial of the receipt and retention of this machinery. There is no averment that the sawmill is worth less than the price named, by reason of its alleged want of capacity. Nor is there any allegation that the delays were unreasonable.

The contract for the sawmill and engine is in writing. It contains no warranty whatever. How, then, can the defendant avail itself of the alleged warranty? It is not claimed that the agreement of warranty was omitted from the written contract by fraud, accident or mistake. We understand that such an averment is necessary in order to vary a written contract by parol testimony: *Seitz v. Brewers Ref. Machine Company*, 141 U. S. 510.

But even if there was a warranty, there are no averments of facts in this defense sufficient to enable the court, or a jury if upon trial, to ascertain what the damages suffered by the defendant are. It is true, the defendant alleges, that it was compelled to buy lumber elsewhere at an increased price, but this is not the measure of damages. The true measure is the difference between the contract price of the thing purchased and the market value of the thing delivered. There is no statement in the defense upon this subject: *Weed & Company v. Weinberger*, 12 Sup. Ct. 12; *Ogden v. Beatty*, 137 Pa. 197.

Besides, the defendant has received this machinery, has retained it, and there is no allegation that it even offered to return the same; and there is no offer now to return it: *Tate v. Eschler*, 11 Sup. Ct. 224.

We think the affidavit and supplemental

affidavit of defense are insufficient, and therefore the rule for judgment is made absolute.

For plaintiff, *Shiras & Dickey*.

For defendant, *Lawrence B. Cook*.

**Court of Common Pleas No. 2,**  
**ALLEGHENY COUNTY.**

**BAIR & GAZZAM MANUFACTURING CO. for use v. VANDERSAL.**

*Corporations—Officers—Compensation for services—Corporate action thereon.*

The president of a corporation is not entitled to compensation for his services unless there has been due corporate action authorizing the payment and amount.

No. 374 January Term, 1908.

Opinion by YOUNG, J. Filed January 27, 1908.

This is a rule for judgment for want of a sufficient affidavit of defense. Four reasons are assigned why judgment should be entered in favor of the plaintiff: First. The affidavit of defense does not disclose any corporate action upon the part of the Bair & Gazzam Manufacturing Company allowing the defendant compensation. Second. The affidavit of defense does not disclose any valid agreement between said defendant and said company preceding his alleged services for compensation to him for his official services. Third. There is no denial that defendant took and has \$500 of said company's money, to which under the law he has no title. Fourth. The affidavit of defense is evasive.

In February, 1907, Samuel W. Vandersal was elected by resolution duly passed by the board of directors of the Bair & Gazzam Manufacturing Company president of the company to fill the unexpired term of his predecessor, H. C. Bair. He entered upon the duties of his office and took into his possession on June 17, 1907, \$500 of the plaintiff's money on account of compensation which he claimed for his services rendered to the company as its president. The defendant in his affidavit of defense admits the receipt of the \$500 and claims that he is entitled to it because, having been elected

president of the company he accepted the office upon the express condition and understanding that he should be paid a reasonable and proper salary for the services which he should thereafter render, and that he entered upon the duties of the office, performed the duties, still continues to hold the office, and is willing and ready to perform the duties. There is no question that Mr. Vandersal did render important and valuable services to the plaintiff company, and that if the case went to the jury, the jury would in all probability find that his services were well worth the amount which he claims; but we are confronted in this case by the rule of law that an officer of a corporation is not entitled to compensation unless such compensation has been agreed upon before he accepts the office. An examination of the cases satisfies us that this is the true rule. It was so held in *Kilpatrick v. Penrose Ferry Bridge Company*, 49 Pa. 118, where the court said, "The salary or compensation of corporate officers is usually fixed by by-law or by resolution either of the directors or stockholders, but when no salary has been fixed none can be received." To the same effect is the preceding case of the *Loan Association v. Stonemetz*, 29 Pa. 534, and the subsequent cases of *Martindale v. Wilson Cask Company*, 134 Pa. 343, and *McGowan v. Lincoln Park & Steamboat Consolidated Company*, 181 Pa. 55. The affidavit of defense in this case does not allege the fixing of the salary of the defendant. The most that is claimed by him is that he accepted the office upon the express condition and understanding that he should be paid a reasonable and proper salary. This does not comply with the law as we understand it. It does not allege a resolution of the board of directors by which he would be entitled to a reasonable and proper salary. Even if there were such a resolution, it would not be a compliance with the law as we understand it, because it would not fix the amount of the salary. Nor would it be a good defense to say that the different directors had agreed to the payment of a reasonable and proper salary. As was said in *Allegheny County Workhouse v. Moore*, 45 Pa. 408, "Corporate rights are not to be frittered away by loose and unauthorized declarations made by per-

sons who at the time had no authority to bind the corporation." We are clearly of the opinion that to entitle the defendant to retain any money from the corporation for his salary he must show a resolution of the board of directors fixing his salary before he entered upon the duties of his office.

The rule must therefore be made absolute.

For plaintiff, *Shiras & Dickey*.

For defendant, *Willis F. McCook*.

### Court of Quarter Sessions,

WASHINGTON COUNTY.

#### COMMONWEALTH v. CLUTTER.

*District attorney's bill—Information—Affidavits—Information received—Positive averments.*

It is proper for a district attorney, with leave of court, to present a district attorney's bill to the grand jury based upon information received.

In such a case, where the information sets forth the facts as true, the addition of the words "information on information received," does not affect the positive character of the other averments.

No. 27 February Term, 1907. Motion to quash information, and motion of the district attorney for leave to send bill of indictment before the grand jury.

Opinion by McILVAINE, P. J. Filed February 5, 1907.

On November 12, 1906, William B. McBride appeared before E. N. Dunlap, a justice of the peace in and for Washington county, and "upon oath administered according to law, deposed and said that at Canton Township, in said County of Washington, on about November 7, A. D. 1906, George W. Clutter, the above named defendant, did then and there unlawfully, being a constable and officer of the Commonwealth, wilfully and fraudulently receive and take by color of his office a fee and reward not allowed by law or act of assembly of this Commonwealth, from one Joseph Abraham, and then and there unlawfully extort from the said Joseph Abraham the sum of \$2 by threatening to arrest him for the offence of peddling without a license, for which said payment of \$2 he, said George W. Clutter,

then and there gave a false, forged and counterfeited receipt purported to be signed by one W. B. McBride, whom the said George W. Clutter then and there unlawfully and falsely pretended to be. Information on information received. Complainant therefore prays and desires that a warrant may issue and the aforesaid defendant, George W. Clutter, may be arrested and held to answer the charge of extortion, forgery and false pretence." He was arrested, had a hearing and was bound over to court.

The motion of the defendant's counsel is to quash the information above quoted from because on its face it shows it was made "on information received and not from personal knowledge of the complainant, W. B. McBride, and does not set forth the name of the informant nor the facts communicated to the complainant or his belief in the information received."

The counter-motion of the district attorney is supported by his petition under oath and is "that he be permitted, as prosecuting officer of the said county of Washington, to lay before the grand jury, now in session, a district attorney's bill against the said George W. Clutter on the charges contained in said information," averring that "said offences are against the administration of public justice," in the prosecution of which the public at large is vitally interested."

It is certainly a question vitally affecting the public welfare to know whether its sworn officers, who have to do with the execution of its laws and the administration of justice by its courts, are unlawfully and corruptly using their office for their own private gain and the oppression of others. And the district attorney, having his attention officially drawn to such a charge by its reaching the dockets of the criminal courts, although in an irregular way, would (if after investigation he found the charge probably true) have the right with leave of court to present a bill of indictment before the grand jury for its investigation upon his official oath and responsibility. That this power exists cannot be questioned. "District attorneys' bills," as they are commonly called, are not uncommon in this court. There is not a term that they are not laid before the grand jury: *McCullough v. Com.*, 67 Pa. 30;

*Brown v. Com.*, 76 Pa. 319; *Rowand v. Com.*, 82 Pa. 405.

We might here stop and grant the prayer of the district attorney by permitting a bill of indictment to be laid before the grand jury, but we are requested to also pass upon the motion of the defendant's counsel, even if we do allow a district attorney's bill to be filed for the same offence charged in the information, so that justices of the peace may be informed as to their duty in drawing complaints which are made before them in criminal cases.

The Constitution of the commonwealth of Pennsylvania provides that no warrant shall issue to seize the person of any one without probable cause, supported by oath or affirmation subscribed by the affiant. Substantially the same provision is found in the Constitution of the United States. George W. Clutter was arrested, and after hearing was bound by his recognizance to appear in this court at the next session thereof to answer the charge contained in the complaint of W. B. McBride as hereinafter set out. The question is, has he been deprived of the right guaranteed him by the constitutional provisions just referred to? We think not. The cases of *Com. v. Roland*, 10 District Reps. 410; *Com. v. Clement*, 8 District Reps. 705, cited by defendant's counsel, can easily be distinguished from the case at bar. In the case passed upon by Judge Reed, the affiant set forth none of the facts communicated to him. The complaint amounted to nothing more than an affidavit "that the affiant had been informed that the defendant had committed the crime of adultery." No facts showing to the justice probable cause were stated in the complaint. In the case decided by Judge Landis, the complaint was "that Joseph Schlegelmilch, upon his solemn oath from information received, saith," etc.

In the case at bar the affiant swears positively and without qualification to the facts, which clearly show probable cause. The words "information on information received" are entirely disconnected with what precedes and is surplusage. For what purpose it was written in the complaint we do not know. It certainly in no way would relieve the complainant from having sworn

that the facts stated by him were true. Every oath made by an affiant that certain facts stated in his affidavit are true must be on information received. All our knowledge is upon information received. A man's convictions that a fact stated by him is true arises from information he has received by inquiry, observation, investigation and study. We hold, therefore, that a complainant in a criminal case cannot swear positively to a fact or facts and then escape the consequence of such oath by adding at the end of the complaint the words "information on information received." If he wants to avoid swearing positively to the truth of a fact, his complaint should read in this way: "John Doe, upon oath administered according to law, deposes and says that he is informed by Richard Roe" that certain facts exist (which constitute probable cause, stating them), and then follow this by the averment that he believes these facts of which he has been informed by Richard Roe are true, and that he expects to be able to prove that they are true.

One about to make a complaint before a justice of the peace in order to obtain a warrant of arrest, we would therefore say, can pursue either of two courses:

1. If the information he has received is of such a character as to produce conviction in his own mind, after investigation, that probable cause for charging the defendant with the commission of a crime in fact exists, he can, "upon his oath, depose and say that the facts showing probable cause are true or are, to the best of his knowledge, information and belief, true:" *Com. v. Green*, 185 Pa. 641.

2. If he wishes to avoid the responsibility of a positive oath, he should, "upon his oath, depose and say that he is informed" (stating the facts which show probable cause of which he is informed, and who informed him), and then state that he believes the facts of which he has been informed to be true, and he expects to be able to prove them true.

And now, February 5, 1907, motion to quash information herein filed overruled, and motion of district attorney to send bill before grand jury allowed.

For commonwealth, *O. C. Underwood* and

C. L. V. Acheson.

For defendant, *McIlwaine & Williams*.

[From Harry Russell Myers, Esq., Washington, Pa.]

## Executive Department,

HARRISBURG.

### SPECIAL BUILDING ASSOCIATION LOANS.

*Special association—Special loans—Act of 1874*

To permit a shareholder to secure a loan in excess of the full value of the shares held by him is a violation of the spirit and the letter of the law, and a step in the direction of making loans to persons who are not shareholders at all, thus ignoring and nullifying the very purpose of building and loan associations, which is to make loans to their shareholders.

Request of Commissioner of Banking Berkey for opinion.

Opinion by FLEITZ, Deputy Attorney-General. Filed December 9, 1907.

Your letter of recent date to this department stating that certain building and loan associations are making what they denominate "special loans" to shareholders, which loans are not based upon the par or market value of the shares held by the borrowers, and asking that you be furnished with an official opinion upon the right of these associations to make such loans, received.

In the act of April 29, 1874, P. L. 73, providing for the incorporation of building and loan associations, the following language appears in clause 1 of section 37: "They shall have the power and franchise of loaning or advancing to the stockholders thereof the moneys accumulated from time to time."

Clause 4 of the same section provides as follows: "The said officers shall hold stated meetings, at which the money in the treasury, if over the amount fixed by charter as the full value of a share, shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan, shall be entitled to receive a loan of not more than the amount fixed by charter as the full value of a share for each share of stock held by such shareholder."

It would be unwise to allow any deviation from this method of making loans, so plainly expressed by the legislature in the act authorizing the creation of these beneficial associations. To permit a shareholder to secure a loan in excess of the full value of the shares held by him is a violation of the spirit and letter of the law, and a step in the direction of making loans to persons who are not shareholders at all, thus ignoring and nullifying the very aim and purpose of these associations, which is to make loans to their shareholders.

I am therefore of opinion and advise you that such practice ought not to be acquiesced in by your department, and that the associations making such loans be notified that they must cease doing so.

(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

The power of an accused person to waive the right to a jury trial is denied in *Re McQuown* (Okla.) 11 L.R.A.(N.S.) 1136.

The Circuit Court of Appeals, Second Circuit, has held, in *Matter of Mayer, Leslie and Baylis*, 19 Am. B. R. 356, that a bankruptcy court is without power to restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt, and pursuant to its terms.

That the mains of a private gas company cannot be laid in a country highway without additional compensation to the owner of the fee, is declared in *Strother v. Calor Oil & G. Co.* (Ky.) 11 L.R.A.(N.S.) 727, although their purpose is to supply gas to the public.

In *Allen v. McMannes*, 19 Am. B. R. 276, it has been held that the sale of the entire stock of goods of a retail merchant, within four months of his adjudication as a bankrupt, casts the burden of proof upon the purchaser to show that he had no notice of facts or circumstances sufficient to arrest his attention and puts him on inquiry and requires him to use such means of knowledge as were at hand to learn whether the seller was not in financial difficulty.

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No. 37.

PITTSBURGH, PA., MARCH 25, 1908.

## Court of Common Pleas No. 4,

ALLEGHENY COUNTY.

### MONONGAHELA NATIONAL BANK OF BROWNSVILLE v. SAY.

*Promissory note—Collateral—Sent without re-  
turning collateral—Affidavit of defense.*

An affidavit of defense to an action on a promissory note which sets forth that plaintiff holds certain stock as collateral and has not offered to deliver same to defendant is insufficient. Defendant's remedy is to pay the note and demand return of the collateral.

No. 970 Fourth Term, 1907. Motion for judgment for want of sufficient affidavit of defense.

SWEARINGEN, P. J.

The plaintiff averred in its statement of demand, that on August 11, 1905, the Harmony Land Company executed and delivered to the defendant, its promissory note at four months, wherein it promised to pay to his order the sum of \$5,000 at the Monongahela National Bank of Brownsville, Pa., that this note was endorsed by the defendant and was purchased by the plaintiff, before maturity for value; that said note was protested when it became due and unpaid, and notice thereof was given to the defendant; and that on March 21, 1906, plaintiff had received on account thereof, \$500. Wherefore, the plaintiff claims \$4,500 from defendant, with interest on \$5,000 from December 11, 1905 to March 21, 1906, and on \$4,500 from March 21, 1906 to date, with protest fees of \$1.52.

In his affidavit of defense, the defendant admits the endorsement of the note. He does not deny that plaintiff purchased it before maturity, and for value. Nor does he deny that the note was protested for non-payment and that he had notice of protest. The defense, upon which he relies, is as follows:

"Defendant admits that he endorsed the note sued upon as alleged in plaintiff's statement of claim. But defendant avers that after the endorsement of said note, to-wit on January 30, 1907, in response to a demand by the plaintiff, he delivered to the plaintiff, three hundred and fifty (350) shares of the capital stock of the Harmony Land Company as collateral security on said note; that said stock is now held by the said plaintiff and that the value of said stock is at least six thousand one hundred and twenty-five (\$6,125) dollars, or the value of one thousand six hundred and twenty-five dollars in excess of plaintiff's claim in this case; that said stock in the possession of the plaintiff, as above stated, is the property of the defendant and that the said plaintiff has not delivered said stock to the defendant or offered so to do, but still retains possession thereof."

We are of opinion that this defense is not sufficient to prevent judgment. It will be observed that the note in suit is a common promissory note—not a collateral note in which there is authority to sell collateral. Whilst the plaintiff is the holder of the collateral mentioned in the affidavit of defense, yet the plaintiff cannot sell the collateral for want of authority. The remedy of the defendant is to pay the debt and demand the return of his collateral, which the plaintiff will then be obliged to deliver to him. The authorities are against the position which is taken by the defendant. *McCausland v. Hickman*, 3 W. & C. 94; *Bank v. Marris*, 1 W. & C. 330; *Wilbert Trust Company v. Weaver*, 6 Lancaster Review 116, *Lishy v. O'Brien*, 4, Watts 141.

We are of opinion that the affidavit of defense does not present any sufficient defense and the rule for judgment is made absolute.

For plaintiff, *Reed, Smith, Shaw & Beal*.

For defendant, *Sylvester J. Luce*.



(Common Pleas No. 4, Allegheny Co.)

**BURNS v. ARMSTRONG.***Practice—Affidavit of defense to amended statement—Second rule for judgment.*

After a rule for judgment for want of a sufficient affidavit of defense was discharged plaintiff filed an amended statement to which defendant filed a second affidavit of defense and plaintiff took a second rule for judgment. Held, that the court had power to entertain the second rule.

An affidavit of defense by the endorser of a note denying that plaintiff gave him notice of dishonor but not denying that the note was duly protested is insufficient.

No. 252 First Term, 1901. Rule for judgment for want of sufficient affidavit of defense.

SWEARINGEN, P. J.

In this case, after an affidavit of defense was filed, a rule for judgment was taken, which upon argument, without objection of plaintiff's counsel, was discharged. Thereupon the plaintiff, by leave of court, filed an amended statement of demand. In this amended statement the plaintiff declared upon a promissory note, of which a copy was attached, marked "A." The following is a copy of the note:

PITTSBURGH, PA., May 1st, 1907.

\$6,000.00

Four months after date I promise to pay to the order of James E. Glass Six Thousand Dollars, at The Treasury Trust Company, Pittsburgh, Pa., without defalcation, for value received.

JAMES E. GLASS.

Endorsed:

JAMES E. GLASS,  
A. I. COOKE,  
CHAS. H. MUEHLBRONNER,  
THOS. MCGOVERN,  
EDWARD SCHENK,  
JNO. H. ARMSTRONG,  
T. BURNS.

The plaintiff averred that, prior to May 1, 1907, he became the holder in due course of a certain promissory note, of which one James E. Glass was maker, and the defendant, among others, endorser; that, being such holder, he had said note discounted at the Lincoln National Bank of Pittsburgh;

that, upon maturity thereof, the aforesaid note, now marked "A," was made and endorsed as aforesaid and delivered to the Lincoln National Bank in payment of said note previously discounted by it; that, upon maturity of said note, now marked "A," payment thereof was refused and it was protested, notice of which was given to the defendant and to the other endorsers and to the maker; that plaintiff has been obliged to pay and lift said note, which he now holds.

To this amended statement of demand the defendant filed what he called a protest, in which he denied the right of the plaintiff to require him to file an affidavit of defense to said amended statement; and then the defendant filed an affidavit of defense to said amended statement of demand.

In the latter affidavit, the defendant "on information received" denies that the Lincoln National Bank discounted the note executed prior to May 1, 1907; but the defendant does not allege that he believes such information, and that he expects to prove it. He denies that the note in suit was delivered to said bank in payment of the prior note. He, "on information received," denies that exhibit A is a true and correct copy of the note, upon which suit is brought; but he does not state wherein said copy is incorrect, nor that he believes the information, and expects to prove it. He, "on information received," denies that the plaintiff had the note in suit protested; and he denies that the plaintiff, as junior endorser, gave notice of protest or dishonor to defendant. But the defendant does not deny that notice of protest was sent to him and to the other endorsers.

Thereupon the plaintiff entered a second rule for judgment for want of a sufficient affidavit of defense. The defendant now takes the position that the court has no power to entertain the second rule. But we cannot agree with him. The purpose of the practice is to avoid delay, by having the court, upon a rule, determine what it must determine upon trial, whether or not, assuming all that is alleged in the defense as true, the plaintiff is entitled to binding instructions. The reason for the practice applies to a case where an amended statement

is filed and an affidavit of defense thereto is filed, equally as strong as it does in the first instance. It will be observed that the defendant voluntarily filed his affidavit of defense to the amended statement. There is no question here as to the right of the plaintiff to compel the defendant to file such an affidavit of defense. He has filed it. But we think the point is decided in the case of *Cook v. Forker*, 193 Pa. 461.

The defendant has not denied the making and endorsing of the note in suit, and he has not sufficiently denied the copy attached; he has not demanded inspection of the original. The defendant has not denied that the plaintiff is the holder of the note in suit. He has not denied that said note, at maturity, was presented at the place named in the note for payment, and that payment was refused. He has not denied that said note was protested. He does say that the plaintiff gave him no notice of dishonor. But this is immaterial. It was the duty of the Lincoln National Bank to protest the note, upon non-payment, and to give the notice. There is no averment that said bank did not do so; and there is no averment that notice of dishonor was not sent to the defendant: *Odd Fellows Savings Bank v. Miller*, 179 Pa. 412.

The defendant endorsed this note, gave the credit of his name to all subsequent endorsers, and he cannot avoid liability by proving the allegations in this affidavit of defense.

The rule for judgment is made absolute.

For plaintiff, *Robert T. McElroy*.

For defendant, *T. L. Gartner*.

(Common Pleas No. 4, Allegheny Co.)

### BOROUGH OF CRAFTON v. RICHARDS:

*Municipal claims—Assumpsit—Act of April 23, 1889—Act of April 4, 1907.*

The act of April 23, 1889, providing for the filing of municipal claims for street improvements is exclusive in the remedy and does not authorize an action in assumpsit for the claim.

The act of April 4, 1907, providing that municipal claims may be proceeded for by lien or by action in assumpsit is not retroactive.

No. 226 First Term, 1908. Demurrer.

Opinion by CARNAHAN, J. Filed January 9, 1908.

Beals street, in the borough of Crafton, was paved and curbed in 1901 by authority of an ordinance of said borough. The defendant was then and is now the owner of a certain lot of ground abutting upon Beale street, which was so improved in front of said premises. The borough, in 1907, brought an action of assumpsit to recover from defendant her proportionate share of the cost of said improvement, allowing a deduction of one-third of the total cost, which the borough itself had assumed and paid. To the plaintiff's declaration the defendant demurs, assigning as a reason, *inter alia*, that the act of assembly under which the improvement was made prescribes a method by which the cost of the same is to be collected, namely, by municipal claims filed against the delinquent owners.

The act of April 23, 1889, P. L. 44, being the act referred to and under which the said improvement was made, provides for the filing of municipal claims and makes no reference to actions of assumpsit. The method so provided is exclusive, and if there be no other legislation applicable to the subject and upon which this action can be properly based, it is brought without authority of law and cannot be sustained.

The plaintiff relies upon the act of assembly of April 4, 1907, P. L. 40, as authority for the action. This act provides:

"Section 1. Be it enacted, etc., That hereafter all municipalities of the Commonwealth of Pennsylvania may proceed for the recovery or collection of any municipal claim or claims whatsoever, by lien or by action of assumpsit."

Statutes should be so construed as to operate prospectively and not retrospectively, unless it be plain, from the language used, that the intention of the legislature was otherwise. We find nothing in this statute to indicate that the legislature intended that it should have a retroactive effect; nor does its title, which is "An act providing for the recovery and collection of municipal claims by lien or by action of assumpsit," give indication of such intention.

We are, therefore, of opinion that the act

of April 4, 1907, is not retroactive in effect. It follows that this suit is without authority of law and that the demurrer should be sustained.

And now, to wit, January 9, 1908, upon due consideration, the demurrer of defendant is sustained and judgment is hereby entered in favor of defendant and against the plaintiff.

For plaintiff, *John O. Petty.*

For defendant, *H. G. Tinker.*

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

**COMMONWEALTH ex rel. COMMISSIONER OF NORTH VER-SAILLES TOWNSHIP v. PITTSBURGH & CONNELLSVILLE R. R. CO.**

*Railroads—Turnpikes—Occupancy of—Damages—Act of 1869—Mandamus.*

A railroad company, which in the improvement of its road, crosses or occupies a turnpike and such improvement is within the meaning of the act of 1869, relating to the straitening and widening of the right of way of railroads, the proceeding to determine the damages for such crossing or occupancy is by the appointment of viewers in the quarter sessions and not by writ of alternative mandamus, provided the act of 1869 is supplemental to the charter under which the railroad operates.

No. 561 July Term, 1907.

Opinion by YOUNG, J. Filed January 23, 1908.

This cause comes before us upon demurrer to the return to the alternative writ of mandamus. The defendant, in the second paragraph of its return, suggests that the Pittsburgh & Connellsville Railroad Company was incorporated under the act of April 3, 1837, P. L. 185, and the various amendments and supplements thereto, and suggests that the act of March 21, 1855, P. L. 104, provided that the provisions of the fourth and fifth sections of the act of assembly of March 27, 1848, and the act of March 20, 1849, relating to the assessment of land damages and the crossing and occupying of turnpike or public roads, should be extended

to the Pittsburgh & Connellsville Railroad Company, and that all former amendments or supplements to the act inconsistent therewith were repealed. Defendant further suggests that the act of 1849 provides in substance that when the site of any turnpike or public road has been changed and when the necessary time has elapsed to enable the railroad to comply with the provisions of the fifth section of the act of 1848, it shall be the duty of the court of quarter sessions of the county in which such turnpike or public road shall be located, upon petition of the company owning the said turnpike, or twelve or more citizens of the township in which said public road may be, to appoint three competent persons, etc., as viewers, etc. And it is therefore suggested that this court has no power to award the writ of mandamus in this case, but that the plaintiff has an adequate remedy at law by proceedings in the court of quarter sessions. To this return the plaintiff filed a demurrer, and the single question to be decided is whether the jurisdiction is in this court by writ of mandamus or whether the jurisdiction is in the quarter sessions by the appointment of viewers, etc.

The act of March 27, 1848, P. L. 273, is a supplement to the charter of the Pennsylvania Railroad Company, and in its fifth section provides that if said railroad company shall find it necessary to change the site of any turnpike or public road they shall cause the same to be reconstructed. It having been determined, as set forth in the preamble to the act of the 20th of March, 1849, P. L. 196, which was also a supplement to the charter of the Pennsylvania Railroad Company, that, while provision was made for the reconstruction of a public road taken, there was no provision made for compelling the company to comply with that law, it was therefore enacted that the court of quarter sessions should upon petition of certain persons appoint three competent viewers to inquire into whether the railroad company had reconstructed the road. We have, therefore, the defendant authorized to change the site of a public road, and also provision that if in changing that site a new road is not constructed a proceeding may be had in the court of quar-

ter sessions to determine the question. We have, then, the act of 1869, authorizing a railroad company to straighten and widen its road, and we have, by the decision of the Supreme Court of this state in the case of *Marlor v. Philadelphia, Wilmington & Baltimore Railroad*, 166 Pa. 524, a decision that the act of 1869 is to be read as a supplement to all railroad charters granted by special laws. If the act of 1869 is a supplement to the special charter of the defendant railroad, there can be read into it all the provisions of the special acts and their supplements granting rights to the defendant company, and therefore, if the defendant company in originally locating its right of way and constructing its railroad had the right to take a public road, it certainly has this right under the act of 1869. While the defendant had exhausted its power by its first location, there can be no question that the act of 1869 was intended to authorize a railroad company to increase its facilities by widening, etc., to meet the exigencies of public travel and business. The defendant company, therefore, had the right under the act of 1869 to take a public road in making its improvements, and the act of assembly authorizing it to take the public road provided the means of compelling the railroad company to supply another road, namely, by proceedings in the court of quarter sessions. The act of March 21, 1806, provides:

"That in all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

This has been sustained by many decisions. A remedy having been provided, as we have seen, in the acts of 1848 and 1849, by proceedings in the quarter sessions, this court has no jurisdiction to compel the building of a road by mandamus.

The demurrer must therefore be overruled.  
For plaintiff, *S. M. Cunningham*.

For defendant, *McCleave & Wendt*.

## Court of Common Pleas,

FAYETTE COUNTY.

### HUTCHINSON v. BARNES.

*Deed—Warranty deed—Husband and wife—  
Subsequent purchase of outstanding interest  
by wife.*

Where a wife has joined with her husband in a warranty deed in conveying an entire estate in land belonging to her husband, and in which she has no interest, and subsequently purchases at sheriff's sale an undivided interest in the land, her purchase of such interest inures to the benefit of the parties holding under the deed which she had previously executed.

No. 216 September Term, 1906. Ejectment.

Opinion by UMBEL, J. Filed August 13, 1907.

From the agreement of counsel the plaintiff's statement and the defendant's answer and abstract of title filed in this case we make the following:

In 1839 the commonwealth of Pennsylvania patented to Isaac Hutchinson a tract of land situate in Union township Fayette county, Pa., containing two hundred and fifty-five acres and one hundred and forty-five perches, and in 1864 said Isaac Hutchinson devised, inter alia, the part now in dispute to Wilson H. Hutchinson for life, and at his death to his children, by will probated December 24, 1866, in Will Book 4, p. 162.

Wilson H. Hutchinson and five of his children by deeds of various dates conveyed the land in dispute to Elijah Hutchinson, who with his wife Ann, the present plaintiff, by deed dated September 13, 1884, conveyed the land in dispute to Clark E. Hutchinson, who by will probated July 12, 1887, in Will Book 10, p. 292, devised it to Mary Hutchinson, who by deed dated May 10, 1905, recorded in Deed Book 240, p. 205, conveyed it to Walter Hutchison, who by deed dated May 16, 1905, recorded in Deed Book 240, p. 206, conveyed it to Martha B. Barnes, wife of James R. Barnes.

Wilson H. Hutchinson, had seven children, two of whom, Wilson and Howard, did not join in the aforesaid deeds to Elijah

Hutchinson, but by deeds dated September 17, 1890, and October 13, 1892, recorded in Deed Books 96 and 115, pp. 154 and 38, respectively, conveyed their interests in the said land to Geo. B. Hutchinson, as whose property it was sold by the sheriff of Fayette county to Ann Hutchinson—plaintiff herein—sheriff's deed dated April 1, 1897, Sheriff's Deed Docket 4, p. 103.

Since September 13, 1884, Clark E. Hutchinson and those claiming under and through him have had quiet and undisputed possession of the whole of said premises.

While the praecipe and writ set forth and claim an undivided two-thirds interest of and in about twenty acres of the said first mentioned tract, by amendments and admissions, the matter actually in dispute is narrowed and limited to an undivided two sevenths of only eighty-eight perches of the said land, and that is what is claimed by the plaintiff.

In view of the fact that Wilson and Howard, two of the remaindermen and children of Wilson H. Hutchinson, did not join in the conveyances to Elijah Hutchinson, their interests in the said land were not at that time affected thereby and remained undisturbed and continued to vest in them until conveyance by them to George B. Hutchinson, who doubtless could have recovered the said undivided two sevenths had he proceeded to do so.

It is insisted on the part of the plaintiff that she has succeeded to the title and all the right of George B. Hutchinson of, in, and to the said eighty-eight perches, and that if said George B. Hutchinson was entitled to recover the said undivided two sevenths that the plaintiff succeeding to all his rights, etc., in like manner should recover. Against which, however, it is urged on the part of the defendants as follows, viz:

The plaintiff having been a party privy to and joined with her husband in the deed of September 13, 1884, to Clark E. Hutchinson conveying the whole and complete fee simple title to said eighty-eight perches, any interest she might thereafter acquire of or in the same, through any source or channel except Clark E. Hutchinson would inure to the benefit of the said Clark E. Hutchinson

and those claiming by, through or under him.

Open, notorious, adverse, and uninterrupted possession of the said land by the defendant and her predecessors in title for more than twenty-one years.

The plaintiff does not question but that as an abstract proposition of law the principle set forth in defendant's contention above is correct, but insists that it does not apply in this case because the plaintiff herein had no interest in the fee simple title to the property in question when she joined in the conveyance of September 13, 1884.

We have not been able to discover any Pennsylvania authorities exactly in point and none have been cited, but in our opinion the plaintiff knowing, when she purchased the undivided two sevenths as the property of George B. Hutchinson, that she had some years previously joined with her husband in a deed conveying and warranting to Clark E. Hutchinson the entire title to said eighty-eight perches, including the undivided two sevenths she was then purchasing, and possibly for that very reason was induced to become a purchaser at the said sheriff's sale, on her acquiring title in that way to the said undivided two sevenths interests of Wilson and Howard Hutchinson, it would inure to the benefit of the party or parties who then were holding under the conveyance made by the plaintiff and her husband September 13, 1884.

Notwithstanding the plaintiff may not have had any interest in the fee simple title to the property conveyed by the deed of September 13, 1884, in which she joined with her husband, yet she was privy to such deed and had knowledge of such conveyance, in consequence of which, and in view of the said conveyance and warranty, she was interested at least to the extent of it being to her advantage as the wife of Elijah Hutchinson that a good title vest in Clark E. Hutchinson, the vendee, and it being no more than just and right and in line with honesty and fair dealing, we find and conclude as a matter of law that the conveyance to her of the interests of Wilson and Howard Hutchinson by the sheriff's deed of April 1, 1897, inured to the benefit of the grantee in the said deed, Clark E.

Hutchinson, and those claiming through and under him, and her knowledge of the conveyance of September 13, 1884, estops her from claiming under the said sheriff's sale against the defendants; she is not in the position of an innocent purchaser.

The statute of limitations would not begin to run against Wilson and Howard Hutchinson or those claiming under them, until after the death of their father, Wilson H. Hutchinson (*Gernet v. Lynn*, 31 Pa. 94), and their being nothing in the record indicating when he died we are unable to determine whether the state of limitations has any application or not.

Now, July 30, 1907, this matter came on to be heard and was argued, and now, August 13, 1907, upon and after due consideration it is ordered and directed that judgment be entered in favor of the defendants.

For plaintiff, *D. M. Hertzog*.

For defendants, *J. C. Work* and *A. C. Hagan*.

[From *D. W. McDonald, Esq., Unlontown, Pa.*]

**CONSTITUTIONAL LAW. (LICENSE TAX.)** U. S. SUP. CT.—The right of a state to impose a license tax on the business of selling intoxicating liquors within the state by any traveling salesman who solicits orders is upheld in *Delamater v. South Dakota*, 27 Sup. Ct. Rep. 447, as under the Wilson act the power of a state attaches to intoxicating liquors when shipped into the state from another one after delivery, but before the sale in the original package, so as to authorize the state to regulate or forbid such sale. The court holds that it follows that the regulation by the state of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors are situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in the state—a right which, by virtue of the Wilson act, does not exist. It was contended that as under the Wilson act a resident of one state has the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, an agent or traveling salesman of a nonresident

dealer in intoxicating liquors has the right to go into the state and there carry on the business of soliciting from residents orders for liquors, to be consummated by acceptance of the proposals by the nonresident dealer whom he represents. This premise the court says is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of the court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled. *Alleyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427.—*The Green Bag*.

**STARE DECISIS.**—A case forcibly illustrating the legislative department's reluctance to remedy defects in the law disclosed by judicial decisions is that of *People v. Tompkins*, 79 Northeastern Reporter 326. In this case the Court of Appeals of New York reaffirms the doctrine of *McCord v. People*, 46 New York 470, that a prosecution for larceny by false pretenses cannot be sustained where the person parting with his property or money does so for any legal purposes. The court admits that the weight of authority is to the contrary, but feels bound to follow the doctrine as settled by the earlier decision, the duty of making a change resting with the legislature, and says that to change the existing rule would, in effect, be enacting an *ex post facto* law.

**TORTS. (PROCURING BREACH OF CONTRACT.)** MASS.—Where one agrees in a contract to act as the exclusive agent of another in a certain territory, he may obtain an injunction to prevent a third person from also acting as agent in his territory according to *Beekman v. Marsters*, 80 N. E. 817. Plaintiff in this case had obtained from a hotel corporation conducting a hotel on the Jamestown Exposition grounds a contract whereby he was made their exclusive agent for the New England States to solicit patronage for the hotel. Defendant had induced the hotel corporation to break this contract with plaintiff in order to allow him to act also as their agent in the New England States. The court held that equity would enjoin defendant in acting as such agent. The court notes that the rules applicable to enticing away a servant, apply to the case. If a defendant by an offer of higher wages entices a laborer who is not under a contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights. But it is quite different if a laborer is under contract and the defendant knowing that, intentionally entices the laborer to leave plaintiff's employ by an offer of higher wages. As to the necessity of showing malice, the court says that this was not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant, with knowledge of the contract between the plaintiff and the hotel corporation, intentionally and without justification, induced the hotel corporation to break it. That is proof of malice.—*The Green Bag*.

By the laws in force in the Indian Territory an action at law may be instituted against a person usurping an office, either by the state or by the party entitled to the office. This is in lieu of scire facias and quo warranto or an information in the nature of a quo warranto. But according to the decision of the Court of Appeals of the Indian Territory in *Re Le Bosquet v. Myers*, 103 Southwestern Reporter, 770, the statutory provisions apply only to public officers, and not to proceedings for the ouster of officers of a private corporation.

**THE POWER OF LIQUOR.**—During the early days of the prohibition law in Iowa there were many cases coming up, where liquor was seized, and the question arose as to whether or not the liquor was intoxicating. Once a bottle-goods case was on trial in one of the courts of midland Iowa and a jury was duly selected to try the issues as to whether or not the stuff called by some "sloop ale," by others "home brew joy," "white rose," etc., was intoxicating. There was evidence of the officers, and others that the stuff was kept on the premises, and sold, and that the people got drunk on it. There was evidence by the defendant and others that it was a safe, soft drink, while others did not know whether it was beer or not, although it was duly proved that these men were old hands in rushing the growler.

The liquor was brought into court in a case, and the jury wished to have the case sent to the jury room for examination. The jury was out a long time, and finally came back into the court room and asked to be discharged.

The judge asked the reason why.

The foreman arose and with a dignified bearing said "your honor, there be two jurors who refuse to vote on dis here ting, for they got noting of the beer we drank up. Before we can agree der sheriffs must bring in some more beer dat dem other two fellers do get their share of the drinks."—*The Green Bag*.

The United States Circuit Court for Ohio in *Wall Paper Company v. Louis Voight & Sons Company*, 148 Federal Reporter 939, denies the right of the wall paper trust to recover from a wall paper dealer for goods bought by the dealer from various members of the wall paper combine.

Because a foreign corporation has acquired a controlling interest in a domestic corporation does not, according to the United States Supreme Court in *Peterson v. Chicago R. Co.*, 27 Supreme Court Reporter, 513, make it amenable to process in the state, when the domestic corporation retains its own officers, its property, and is responsible for its contracts.

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No. 38.

PITTSBURGH, PA., APRIL 1, 1908.

## District Court, United States,

WESTERN DISTRICT OF PENN'A.

### In the Matter of PITTSBURG DRUG COMPANY, Bankrupt.

*Bankrupt—Rent—Priority—Lease—Insurance  
and taxes—Priority.*

Bankrupt leased certain business property for two years from May 1, 1906, for a total rental of \$27,500, payable monthly in installments. The lease provided that "in case default be made at any time in the payment of any installment of rent or of water tax or of any other sum which may become due by the terms and conditions of this lease \* \* \* or bankruptcy proceedings be begun by or against said lessee, or an assignment be made for the benefit of creditors or a receiver appointed, the entire balance of the term of the lease \* \* shall become due and payable and a landlord's warrant may be issued forthwith on the lease and prosecuted to levy and sale for the collection of the same." Default was made in the payment of rent due September 1, 1906, and the following months, a receiver appointed, and on November 26, 1906, the lessee thrown into bankruptcy by involuntary proceedings. The goods on the leased premises were subsequently sold by the trustee for more than sufficient to pay the rental for the whole term. Held, that under section 64b 5 of the bankruptcy law, giving priority to any person who under the state laws would be entitled to priority and under the act of June 16, 1836, relating to distress for rent, the landlord was entitled to priority of his claim though the goods upon the premises had not been actually taken by warrant of distress.

The petition in bankruptcy was filed November 26, 1906, at which time there was owing a balance on the September installment of rent and also the installments for October and November, and by the terms of the lease above quoted the balance for the whole term thereupon became due and payable. Held, that the rent for the balance of the term become a fixed liability within the meaning of section 63a 1 of the bankruptcy act

and provable in bankruptcy, and the landlord, under the act of 1836, was entitled to prove his claim for rent for one year as a prior claim and to prove the balance as an unsecured debt.

By the terms of the lease a default occurred in case of failure of the lessee to pay municipal taxes, water rent and insurance. On November 26, 1906, the date of the bankruptcy proceedings, the insurance for which lessee was liable was not due nor were the taxes for 1907 which lessee covenanted to pay. Held, that these items were not a fixed liability at the time of the filing of the petition and were not provable in bankruptcy.

No. 3397, in Bankruptcy.

Opinion by YOUNG, J. Filed February 28, 1908.

This case comes before us upon the certificate of the referee in bankruptcy awarding to D. E. Nevin, landlord of the bankrupt, a priority in the sum of \$11,458.40, and an unsecured claim in the sum of \$13,722.71 for rent of the premises where the bankrupt carried on its business. Exceptions were filed to the report and order of the referee by the trustee in bankruptcy to the allowance of the priority and to the unsecured claim. The landlord also filed exceptions to the report and order, alleging that the referee erred in not allowing as a priority the further sum of \$1,962.64, an amount equal to the city taxes for 1907; the sum of \$201.59, an amount equal to the city water rent for the year 1907; and the sum of \$363.51, an amount equal to the county taxes for 1907; and the sum of \$1,440, an amount equal to the fire insurance premiums due November 27, 1907.

#### STATEMENT OF FACTS.

The bankrupt upon the 17th day of May, 1906, by lease in writing, rented from Daniel E. Nevin certain premises at the corner of Wood street and First avenue in the city of Pittsburgh for the term of two years from the first day of May, 1906, to the 30th day of April, 1908, for the total rent of \$27,500, payable in monthly installments of \$1,145.84. The lease also provided for the payment of certain sums in addition to the rent, that provision being as follows: "In addition to the rent above specified, lessee agrees and covenant; to pay said lessor as additional rent, the following sum viz.: on or before March 30th, 1907, a sum equal



to amount of city taxes assessed against said premises, March and September installment for 1907; likewise on or before June 30th, 1907, a sum equal to the city water rent assessed against said premises for 1907; likewise on or before July 30th, 1907, a sum equal to the Allegheny county taxes, assessed against said premises for 1907, provided that for the year 1907, if on or before the above respective dates lessee pays or causes to be paid the taxes, delivering the lessor the official receipts therefor, credit shall be given said lessee for said respective sums on account of this lease; also on or before March 30th, 1908, lessee shall pay lessor a sum equal to one-third of all taxes assessed against said premises for 1908, city, water and county. Lessee also covenants and agrees to pay lessor as additional rent a sum or sums sufficient to pay all premiums of fire insurance in approved companies from the date of this lease to April 30th, 1908, to the amount of \$60,000 required by the first mortgage, and \$20,000 required by the second mortgage now on said premises, and in the event of the cancellation of any or all of the policies and the refusal or neglect of the lessee to pay said premiums or pay the amounts or any of them above specified required to pay taxes where and as specified, lessor, at his option may cancel this lease, or proceed and collect any and all said same as additional rent, in the same manner as provided in this lease, by landlord's warrant, confession of judgment or otherwise."

The lease also contains the following provision: "And it is further agreed that in case default be made at any time in the payment of any installment of rent or of the water tax, or of any other sum which may become due by the terms and conditions of this lease, or should the said lessee at any time remove or attempt to remove any of the goods and chattels from the premises without having paid the entire rent and water rent and other items above referred to, or should an execution be issued against lessee, bankruptcy proceedings be begun by or against said lessee, or an assignment be made for benefit of creditors, or a receiver appointed, the entire balance of the term of the lease, including water tax or other sum, etc., then unpaid, shall thereupon become

due and payable, and a landlord's warrant may be issued forthwith on this lease, and prosecuted to levy and sale for the collection of the same."

The facts as agreed upon before the referee were:

1st. That defaults were made by the lessee in the payment of rent under said lease due September 1st, October 1st and November 1st, 1906, and that on November 23, 1906, in the Court of Common Pleas No. 2 of Allegheny county, The Seamless Rubber Company against the Pittsburgh Drug Company, at No. — January Term, 1907, on bill in equity filed, C. F. Patterson was appointed receiver of the Pittsburgh Drug Company, and thereafter on November 26, 1906, at the above number, an involuntary petition in bankruptcy was filed against the Pittsburgh Drug Company, the act of bankruptcy in said involuntary petition being the above stated appointment of a receiver by the common pleas court.

2nd. That after the appointment of the receiver in the common pleas court and prior to the filing of the bankruptcy petition, counsel for the said landlord stated to the receiver in the common pleas court that the landlord proposed to claim one year's rent as a priority claim and the rent for the balance of the term as an unsecured creditor, thereafter upon the filing of the bankruptcy petition and the appointment of the said Charles F. Patterson as receiver in the bankruptcy court, renewed and reiterated said statement to him as receiver in the bankruptcy court.

3rd. The said receiver took possession of the personal property on the premises described in said lease and the same was thereafter sold by Justus Mulert, trustee in bankruptcy, on March 16, 1907, to J. M. Young for the sum of \$31,350, the goods so sold having been goods that were on the premises and subject to distress at the time the receiver was appointed in the common pleas court and in the bankruptcy court.

4th. The city of Pittsburgh taxes, March and September installments, 1907, and the water rent for 1907, and the county taxes for 1907, specified in exhibit B attached to the landlord's claim, were ascertained and assessed in February, 1907.

5th. The landlord became liable for the fire insurance premiums on November 27, 1906, appearing upon exhibit B attached to landlord's claim, in amount of \$1,440, and actually paid the same on December 4, 1906. These insurance premiums being for insurance on the premises according to terms of the lease in advance for one year from November 27, 1906.

6th. On the 22nd of April, 1907, the trustee notified the landlord that he would cease to occupy the premises after the end of April, 1907, and offered to surrender the premises. On the 25th of April, 1907, the landlord refused to accept the surrender of the premises.

7th. Prior to the first of May, 1907, the trustee, in pursuance of the foregoing notice to the landlord, vacated and abandoned the premises, and since May 1, 1907, has occupied them in no way whatever, and the landlord has refused to accept said surrender of the premises or to retake possession of the same in any way.

8th. It is further agreed upon as a fact, if deemed material by the court, that the premises are now occupied by J. M. Young above named, without permission or without any contract of lease, contract or agreement of any nature whatsoever with the said landlord, but the said J. M. Young stands ready and willing to pay \$200 a month rental to whichever party will receive the same, but both of said parties have refused to consider any negotiations or offers whatsoever from the said J. M. Young.

The landlord, alleging a default, filed a proof of claim for the sum of \$25,181.11, claiming priority for the sum of \$15,426.14, and the balance \$9,754.97 as an unsecured claim.

Out of the above facts arises the question, is the landlord entitled to a priority for a part of his claim and an unsecured claim for the balance? This question naturally falls into two inquiries: first, is the landlord entitled to priority, no warrant of distress having been issued; and second, to what amount is the landlord entitled to priority.

The landlord's claim to priority, if allowed, must be based upon the provisions of the bankrupt act of 1898, Sec. 64b 5, which provides that the debts to have prior-

ity shall be, among others, "debts owing to any person who by the laws of the state or the United States is entitled to priority." The question then arises, is the landlord's claim for rent such a debt as under the laws of the state of Pennsylvania would be entitled to priority? The act of June 16, 1836, Sec. 83, P. L. 777, of the Commonwealth of Pennsylvania, provides: "The goods or chattels being in or upon any messuage, lands or tenements which are or shall be demised for life or years or otherwise, taken by virtue of an execution and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution; provided that such rent shall not exceed one year's rent." While the statute allows the landlord one year's rent where the goods liable to distress are taken in execution, it was decided in *Longstreth v. Pennock*, 87 U. S. 575, that where the goods are taken by an assignee in bankruptcy the claim of the landlord to a year's rent is within the equity of the statute which gives a preference in case of execution.

It would appear then that the bankrupt act having given a priority to any person who under the laws of the state would be entitled to a priority, and the statute of Pennsylvania having entitled the landlord to one year's rent out of the proceeds of the sale of goods on the premises liable to distress, the landlord is such a person as is provided by the section of the bankrupt act referred to and the debt such an one as is entitled to priority.

It was argued that the case of *York Manufacturing Company v. Cassell*, 15 Am. B. R. 633, which decided that the trustee in bankruptcy was vested with no better right or title to the bankrupt's property than belonged to the bankrupt, following *Thompson v. Fairbanks*, 196 U. S. 516, where the court said: "Under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by

some positive provision of the act," qualified the doctrine of *Longstreth v. Pennock*, supra. We are of opinion that those decisions do not qualify the doctrine of that case, but rather emphasize the right of the landlord to claim his rent, all the goods on the premises being under the terms of the lease subject to distress for the entire rent of the term. So that the trustee, standing in the shoes of the bankrupt, took the goods subject to the landlord's right of distress, that right being limited by the act of 1836 to an amount not exceeding one year's rent, and it having been admitted in this case that the goods taken by the trustee were on the premises, liable to distress and were sold for more than sufficient to pay the rent for the entire term. It has been uniformly held in Pennsylvania, not only under the act of 1836, but under the original act of 1772, and down through all the cases to the present time, that in case of execution the landlord was entitled to one year's rent due at the time of the seizure of the goods.

It was argued in this case that the claim of priority could not be allowed because there was no distress prior to the bankruptcy petition. We do not regard this as tenable. The landlord had the right of distress, the goods were subject to distress. The statute itself provides that the landlord shall have this right if the goods are liable to distress. In *Moss's Appeal*, 35 Pa. 162, Mr. Justice Woodward said: "Undoubtedly, the landlord cannot claim the proceeds of goods that he could not have distrained; but what right have we to say in the face of the statute, that he may not claim the proceeds of goods that were liable to his distress? No reasoning that we have met in reported cases would seem to justify so narrow a construction of a remedial statute." This is recognized in *In re Gerson*, 2 Am. B. R. 270. We must conclude, therefore, that if the goods were on the premises and liable to distress the landlord would be entitled to his claim, though the goods had not been taken by warrant of distress.

We now come to the second inquiry, and that is, to what amount is the landlord entitled to priority? While the statute gives the landlord one year's rent he is only entitled to this rent if it was due at the time

of the seizure of the goods under the execution. We must therefore determine what amount of rent was due at the time of the filing of the bankruptcy petition, November 26, 1906. It appears from the landlord's proof of claim that at that time there was past due rent for the month of September to the amount of \$291.68, rent for the month of October, \$1,145.84, and rent for the month of November, payable in advance, \$1,145.84. But it is claimed by the landlord and awarded by the referee, rent from September 1, 1906, to September 1, 1907. This claim of the landlord is based upon the covenant in the lease that if default be made in the payment of rent, or if, among other things, a receiver be appointed, the rent for the entire term should become due and payable, and it is claimed that *Platt v. Johnson*, 168 Pa. 47, is authority for the claim. It is there said: "As was said in *Goodwin v. Sharkey*, 80 Pa. 149, 'the whole rent for the term might have been made payable at any time during the running of the lease, upon the happening of any contingency. The right of distress would immediately arise,' upon the happening of the specified contingency; and that right might be exercised by the lessor to the extent of collecting more than one year's past due rent, provided the rights of execution creditors have not previously attached. If they have, the act of June 13, 1836, limiting the lessor's right to payment out of such fund to an amount not exceeding one year's rent, becomes operative in favor of the execution creditors." This is the law of Pennsylvania, but it at once gives rise to the inquiry whether parties by contract or by covenant in their lease can avoid the provision of the bankrupt law which requires, "a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not," as provided by Sec. 63a 1 of the bankrupt act. It appears to have been decided in many cases by different judges of the district courts that rent which would fall due after the filing of the petition in bankruptcy will not be provable, although the covenant of the lease provides that it shall become due. In our own circuit, in the case of *Wilson v. Pennsylvania*

*Trust Co.*, 114 Fed. 742, it was said by Judge Acheson: "Notwithstanding the ruling in *Platt v. Johnson*, 168 Pa. 47, upholding as valid a provision in a lease that the entire rent for the balance of the term should become due if the lessee should become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, it may well be doubted whether the stipulation here making the whole rent for the whole term due and payable if the lessee shall become a bankrupt is enforceable as against the provisions of the bankrupt act." The question, however, was not decided as the case went off on another question. So far as we have been able to find, the question has not been decided by an appellate court. It is an important question and one of especial importance in this case because of the large amount involved.

Notwithstanding the eminent authority cited by counsel for the trustee, and especially the case of *Wilson v. Pennsylvania Trust Co.*, supra, we are of opinion that the covenant in the lease making the rent for the entire term fall due is good and the debt thereby created one provable in bankruptcy. In the cases cited, and especially in *Wilson v. Pennsylvania Trust Co.*, supra, the default provided for was the event of the tenant becoming a bankrupt. In the case at bar the default relied upon is provided by the following clause of the lease: "And it is further agreed that in case default be made at any time in the payment of any installment of rent or of the water tax, or of any other sum which may become due by the terms and conditions of this lease, or should the lessee at any time remove or attempt to remove any of the goods and chattels from the premises without having paid the entire rent and water rent and other items above referred to, or should an execution be issued against lessee, bankruptcy proceedings be begun by or against said lessee, or an assignment be made for benefit of creditors, or a receiver appointed, the entire balance of the term of the lease, including water tax or other sum, etc., then unpaid, shall thereupon become due and payable, and a landlord's warrant may be issued forthwith on this lease, and prosecuted to levy and sale for the collection of the same." It

is admitted that part of September rent and all of October and November rent for 1907 was past due and that a receiver had been appointed by the state court on November 23, 1906, and that that receiver had been notified that the landlord would claim a year's rent as priority and the balance as an unsecured claim, and all before the filing of the bankruptcy petition. So that, it appears by the express terms of the contract the entire rent for the term had become due, had become "a fixed liability absolutely owing at the time of the filing of the petition," and a landlord's warrant could have been issued for the collection of the entire amount.

It also appears to us to be just as much a fixed liability, evidenced by an instrument in writing, absolutely owing at the time of the filing of the petition as a bond securing the payment of an annuity (*Cobb v. Overman*, 109 Fed. 65), or a bond of an administrator (*Hibbard v. Bailey*, 129 Fed. 575), which by its provisions would fall due upon a default being made. In its favor we have the weight of authority of the case of *Platt v. Johnson*, supra.

We are therefore of opinion that not only is the debt one provable in bankruptcy, but that the whole amount became due under the express covenants of the lease and limited by the act of 1836, allowing a priority to the landlord to an amount not exceeding one year's rent, the remainder to be proved as an unsecured debt.

A question also arises as to the taxes, which under the terms of the lease are made payable at certain times after the filing of the bankruptcy petition, namely, March 30, June 30 and July 30, 1907, and the premiums of insurance payable November 27, 1906, also after the filing of the bankruptcy petition. There is an express covenant in the lease that these taxes should be paid as additional rent on or before the dates specified. These taxes and the water rent were therefore made additional rent by the lease, and under the express covenants of the lease would be added to the monthly rents for the months of March, June and July, 1907, and would become due upon the default in the payment of any of the installments of rent, or upon the appointment

of a receiver or other contingency provided by the lease, and could have been collected when those dates arrived as rent for those months, and if a bankruptcy petition had not been filed until after those several dates arrived, they would have become due and collectable under the express terms of the lease in case of default; but the bankruptcy petition was filed on November 26, 1906, and before the amount of taxes could be determined, because those taxes could not be determined until the municipal authorities, city and county, had fixed the rate and made the tax levy. They were not liquidated and could not be liquidated until after the proper municipal action had been taken. How can it then be said that they became due by the default? What amount became due? Certainly not the amount now claimed, for that amount was not fixed and determined until after the filing of the petition, namely, by the tax levy in February, 1907. The taxes, therefore, were not a fixed liability at the time of the filing of the petition and would not be provable in bankruptcy as between the landlord and his tenant, and necessarily, could not be allowed as a priority.

The same is true as to the insurance premiums, which it is admitted the landlord did not become liable for until November 27, 1906, the day after the petition in bankruptcy was filed. The premiums of insurance, therefore, cannot be allowed as a priority.

The taxes and premiums of insurance not being a fixed liability within the meaning of Sec. 63a 1 of the bankrupt act are not provable as unsecured claims, as we have above concluded. Nor are they such unliquidated claims against the bankrupt as can be proved under Sec. 63b, our understanding of that section being that it admits to proof only those claims which can be liquidated by legal proceedings instituted at the time of the bankruptcy; and this claim, as we have seen, could only be liquidated by the proper municipal action fixing the rate of taxation and the amount of the tax levy.

We find, therefore, that the landlord is entitled to priority for one year's rent, less the payments that have been made to him, as found by the referee, and to prove the

remainder of the rent for the term as an unsecured claim; that he is not entitled to the taxes and insurance premiums as claimed by him and is not entitled to prove them as an unsecured claim. As thus modified the report of the referee is affirmed and all exceptions either sustained or rejected in accordance with this opinion.

For claimant, *C. A. Woods.*

For trustee, *W. A. Way.*

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A manufacturer, engaged in the manufacture of steel, in accordance with a secret process discovered by him, who sues a former employe and a competitor who has employed the former servant, to restrain the servant from disclosing the secrets to the competitor, and the competitor from retaining the servant in its employ, is not required to disclose on the trial the secret process of his business, according to the decision of the New Jersey Chancery Court, in *Taylor Iron & Steel Co. v. Nichols*, 65 Atlantic Reporter, 665.

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In *Security Warehousing Co. v. Hand*, 19 Am. B. R. 291, the Supreme Court of the United States has held that, as the general law of pledge which requires possession by the pledgee prevails in the State of Wisconsin, receipts given by a bankrupt warehousing company acknowledging the receipt of property when there was in fact no change of possession and scarcely any in form, are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them (*distinguishing Union Trust Co. v. Wilson*, 14 Am. B. R. 109); that a trustee in bankruptcy stands in the shoes of the bankrupt, and all property of the estate, unless otherwise provided in the Bankruptcy Act, 1898, is subject to all the equities impressed upon it in the hands of the bankrupt; but that in the circumstances of the case at bar, there being no valid pledge of the so-called warehouse receipts, no equitable lien arose in favor of the intervening holders thereof, which would take precedence of the title of the trustee in bankruptcy by virtue of sections 70a and 70e of the Bankruptcy Act.

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No. 39.

PITTSBURGH, PA., APRIL 8, 1908.

## Orphans' Court,

ALLEGHENY COUNTY.

### In re Estate of DAVID S. LOWENSTEIN, Deceased.

*Decedent's estate—Lease by decedents—Covenants of—Liability of estate.*

Decedent sometime prior to his death, individually and as a partner, entered into a lease by the terms of which he became liable, inter alia, for the payment of the water rent assessed yearly upon the premises. He died two years before the expiration of the lease, and the term was completed by his partner, who failed to pay the water rent. The lease covenanted that the liabilities thereunder should extend to the heirs, executors and administrators of the lessees. Held, that decedent's estate was liable for the payment of the unpaid water rent for the balance of the year.

No. 58 October Term, 1906.

Opinion by OVER, J. Filed December 27, 1907.

David S. Lowenstein died intestate November 16, 1904. He and Solomon L. Lowenstein had been partners doing business as the East Liberty Home Dressed Meat Company, and on January 13, 1904, entered into a written agreement with S. W. Vandersaal renting premises 6373 and 5 Penn avenue, Pittsburgh, for a period of three years for a total rent of \$37,500. This agreement was signed and sealed by the lessor and by the East Liberty Home Dressed Meat Company by D. S. Lowenstein, the decedent. It contained, inter alia, the following covenants:

"The lessees also agree to pay as due, all water taxes assessed on the said premises, and to pay for all gas, and electric light used thereon, and will make all necessary repairs to the said building, machinery fix-

tures, appliances, etc., contained in said building, or on the premises, and will keep the premises clean, free of rubbish, and in such condition as the board of health may require, during the term, and if the lessor pays for the same or any part thereof, it will be additional rent payable forthwith. . . .

"All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the heirs, executors, administrators, successors and assigns of such party."

After the death of D. S. Lowenstein his surviving partner continued the business of the firm on the leased premises and eventually purchased the interest of the decedent therein.

In January, 1907, Vandersaal sold the leased premises, and in examining the title it was discovered that the city had a claim for unpaid water taxes assessed thereon, including the estimate for 1907 of \$7,012, and the purchaser retained sufficient of the purchase money to satisfy the claim. It is alleged that \$3,739.44 of this water tax accrued during the period covered by the lease, viz., between April 1, 1906, and January 12, 1907, and Vandersaal presents a claim against the estate for that amount.

The water furnished was measured by a meter, and when so furnished under the city rules an estimate was made at the beginning of the year by the assessor based upon the amount of water used the preceding year as shown by the meter, and the amount of the estimate assessed as the water tax for the ensuing year. Then, at the expiration of the year, if the estimate exceeded the amount used, a rebate was allowed, and if payment had been made the excess refunded, or if the amount used exceeded the estimate, an additional assessment was made. The estimate made for these premises for the year from April 1, 1906, to April 1, 1907, was \$1,050. The meter was out of order from April 1, 1906, to June 7, 1906, but for that period the city ordinance provides that an estimate shall be made of the amount of the water used based on a period when the meter is in order, and from so estimating the water used during that period and from the readings of the meter it appears that the amount of water tax accruing

from April 1, 1906, to January 12, 1907, was \$3,739.44. The water having been furnished the lessees through a meter they are bound by the city's ordinance and rules regulating the assessment of water taxes under that system, and unless there is some other defense, are liable to pay the taxes.

In June, 1906, a fire occurred, injuring the leased premises and the landlord collected some insurance. Solomon Lowenstein, the surviving partner, objected to paying the rent, and Vandersaal agreed to apply the insurance money to repair the building and machinery. Some dispute having arisen as to this matter and the adjustment of rent, they made a settlement on December 18, 1906, when a paper, of which the following is a copy, was executed:

"Pittsburgh, Pa., December 18, 1906.

"I, Samuel W. Vandersaal, do hereby acknowledge receipt of Two Thousand (\$2000.00) Dollars, from Solomon L. Lowenstein, which is payment in full for rent due on lease from me to David S. Lowenstein and Solomon L. Lowenstein, for premises known as Nos. 6371-6373 and 6375 Penn Avenue, Pittsburgh, Pa., dated the 13th day of January 1904; and we do hereby acknowledge and state that settlement has been made in full, as between ourselves, of the insurance money received by reason of the fire on said premises, and that we have no demands upon each other by reason thereof, or arising out of said fire.

"Witness our hands and seals the day and year first above written.

"(Signed) S. W. VANDERSAAL (Seal)

"(Signed) SOL LOWENSTEIN (Seal)

"Witness:

"C. S. CRAWFORD."

It is now claimed that under this paper no claim can be made for any unpaid water taxes. They were not, however, mentioned during the negotiation of this settlement, nor were they in the paper itself. It is true it recites that the \$2,000 is payment in full for rent due, and that the lease provides that the water taxes, if unpaid by the lessees, "will be additional rent payable forthwith." But at that time Vandersaal did not know the water tax was unpaid; under the lease it was the lessees duty to pay it, and Vandersaal had a right to assume that the

lessees would pay them whenever required to do so; moreover, as the amount could not be definitely fixed until the expiration of the fiscal year, April 1st following this agreement, nothing more than the estimated amount, \$1,050, could then have been paid. This receipt and settlement must be construed with reference to what was in the minds of the parties at the time, and that was the insurance money and the adjustment of the rent not including water taxes.

It is also objected to the claim that as the death of this decedent occurred prior to the time this water tax accrued his estate is not liable therefor. The contract in this case names the decedent and Solomon Lowenstein partners, doing business as East Liberty Home Dressed Meat Company, as parties to it. It is executed by the decedent in the firm and his own name under seal, and he expressly covenants that the liabilities thereunder shall extend to his heirs, executors and administrators. Not only was he personally bound by this covenant but his estate is also, and as the contract is to pay money at a future time or on a future contingency it survives the obligor and binds his representatives: *White's Executors v. Commonwealth*, 39 Pa. 167. The claim of S. W. Vandersaal for the amount of unpaid water tax, \$3,739.44, with five per cent penalty thereon is therefore allowed.

### In re SAME.

*Decedent's estate—Lease—Water rent—Liability for.*

Where a decedent's estate becomes liable for water rent by the terms of a lease which had not expired at the time of the decedent's death, which provided that the lessees "shall pay as due all water rents assessed on said premises," the amount to be paid for any one year should be determined by the covenants of the lease. The assessment for the year should determine the amount and an estimate based on the excess of water used as determined by meter, which had been installed by agreement.

Exceptions to adjudication of audit.

Opinion by MILLER, J. Filed March 18, 1908.

"To pay as due, all water taxes assessed on the said premises" is the measure of the

legal liability of the Lowenstein partnership under the lease with the claimant. This means a legal assessment, made by the proper authorities on these premises during the continuance of the lease, in accordance with the provisions of the acts of assembly, or ordinances, of the city of Pittsburgh.

The act of February 20, 1857, P. L. 56, empowers councils of the city of Pittsburgh to adopt schedules of rates by which all water rents shall be assessed to the owners, shall be a lien upon the premises.

The fourth section of the act of March 22, 1877, P. L. 16, provides that water rents for cities of the second class shall be levied in January or February of each year for the succeeding fiscal year beginning April 1st. The sixth section of the same act provides that water rents shall be payable during the month of June of each year.

From the levy or assessment thus made there is no relief, save by exoneration as the act provides. The assessment made in accordance with the act of assembly is a lien from the first of April whether entered or not; if unpaid a lien is filed of record and collection can be enforced as in the case of any other municipal claim. The system of taxation relating to this branch of municipal claims is complete and entire, and the assessment so made concludes the taxing power with respect thereto for that period. By analogy the rule laid down in *Money Penny's Estate*, 181 Pa. 309, relating to collateral inheritance tax is applicable here. The taxing power, having an estimate of receipts and expenditures presumptively in its hands, before the 31st of December preceding, exercises its legal right to fix the tax levy and assessment for the ensuing year upon every subject matter within its grasp, water rents of course included.

The evidence of McClain from the delinquent tax office and of the representatives from the water department, clearly shows that whatever excess or deficit the meter reading indicated, after the period for the assessment of taxes, is not added to, or taken from, the assessment levied and fixed; but it is made part of, or used as the basis for the following year's levy or assessment, and rebuts claimant's contention that the assess-

ment is a mere estimate.

The controversy here is limited to water rents assessed for the year 1906, that is beginning with April of 1906 and ending with March of 1907. Every exhibit offered from the water assessment department, or from the delinquent tax office, shows on its face that the assessment for the year 1906, being the period covered by this lease, is \$1,050. It particularly appears from exhibit No. 13, that the additional water used for the latter part of 1906, fixed the water assessment for 1907, beginning with April 1st of that year. There is no pretense on the part of the water department or the delinquent tax collector's office to include the alleged over consumption as part of 1906 assessment, but to make it the assessment for the year following, the land being liable in either case.

The question before us, is not what it might seem ought to be paid for excess water used, as ascertained after the assessment had been made, but what are the terms of the covenant binding the tenant to pay? As between the owner and the tenant of these premises the additional estimates are not within the terms of the lease. The stipulation is to pay water taxes assessed, not estimated, during the continuance of the lease; there is no stipulation to pay for the amount used.

Nor, are we concerned with what the claimant should pay the city to have his premises freed from the lien of the assessment for 1907. This estate's liability under the lease is the sole matter at issue; it is determined by ascertaining the water tax assessed during the term of the lease. As that is \$1,050, so must be the award in favor of the claimant, including any penalty and costs thereon for delinquency.

To this extent the exceptions are sustained.

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#### In re SAME.

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Dissenting opinion by OVER, J. Filed March 18, 1908.

When the lease on which the claim of S. W. Vandersaal is founded was made, water was furnished by the city on the premises for a fixed yearly rate, for which an assessment was made at the beginning of the



year. Subsequently the system was changed, a meter installed on the premises, the amount of water furnished measured by it, and a charge made for the water actually used. Under this system an estimate was made of the amount which would probably be due the city for water used during the year, and this amount assessed against the property; the water tax being a lien thereon. But this was only a conditional assessment, and if the amount assessed was paid and at the expiration of the year the charge for water used as shown by the readings of the meter was less than the amount assessed, the excess payment was refunded, or if it were more, the amount due in excess of the conditional assessment was added to the assessment for the next year and was payable with it. If the conditional assessment is final and conclusive as to the lessor in the lease it is also as to the lessee, and an injustice might be done to the lessee as well as the lessor. To illustrate: Suppose that by the readings of the meter in this case the city was only entitled to two hundred dollars for water used during the continuance of the lease, that amount is all the claimant would be compelled to pay the city, and yet he under the covenants in the lease could recover from the lessee \$1025, the amount of the assessment. If, however, the covenant to pay the water tax assessed on the leased premises be construed with reference to its purpose such a result is avoided. Its purpose is to compel the lessees to pay the charges of the city for water used on the premises by them during the continuance of the lease; the amount claimed here for water rent seems to be within the intent and meaning of the covenant, and the lessees are liable therefor.

The exceptions to the decree should therefore be dismissed.

For accountant, *Alfred Cahen, M. R. Trauerman and C. S. Crawford.*

For claimant, *Willis S. McCook.*

The guardian of a person since deceased, being an officer of the court, is held, in *Pugh v. Jones* (Iowa) 11 L.R.A. (N.S.) 706, not to be garnishable to reach funds to apply on judgments against the ward's heirs and devisees.

**Court of Common Pleas No. 4,  
ALLEGHENY COUNTY.**

**PITTSBURGH CONSTRUCTION  
COMPANY v. WEST SIDE BELT  
RAILROAD COMPANY.**

*Contract—Arbiter — Award — Assumpsit on  
award—Quantum meruit—Demurrer.*

Where a construction contract provides that the chief engineer shall be the final arbiter of "any dispute which may arise between the parties to this agreement arising or touching the same," and the engineer in pursuance of the contract has made his award, which is not paid and is less than the contractor claimed, it is proper for the latter to bring suit in two counts, one on the award and the other upon a quantum meruit for materials furnished and work and labor done.

No. 398 Fourth Term, 1907. Demurrer to statement of demand.

SWEARINGEN, P. J.

Without reciting all that is set forth in the statement of demand, which is very lengthy, it appears generally that a contract was made, whereby the plaintiff agreed to construct the line of the defendant's railroad. By the terms of said contract, James H. McRoberts, chief engineer, was made final arbiter of "any dispute which may arise between the parties to this agreement relating to or touching the same," and the parties waived any right of action or suit at law or otherwise.

After completion of the work, said James H. McRoberts heard the parties and settled the disputes. Before him, the plaintiff claimed the aggregate sum of \$962,191.05, shown upon exhibits C & D attached to the statement of demand, and admitted credits amounting to \$540,737.63, thus leaving a balance of \$421,453.42 due. After hearing, Mr. McRoberts found that the balance due the plaintiff was \$332,750.98.

As we understand it, there are two counts in this statement of demand. One is upon the award of James H. McRoberts for the amount thereof, to wit, \$332,750.98. The other is upon a *quantum meruit*, in which it is alleged that the amount of the materials furnished and the work and labor done and the fair value thereof are correctly set forth

in said exhibit C & D, and the balance, as shown upon said exhibits after deducting credits admitted, to wit, \$421,453.42, is the amount due.

The defendant has demurred to said statement and has assigned the following reason, viz.:

"The said statement of claim does not disclose a concise statement of plaintiff's demand, in that it does not disclose whether plaintiff's demand is for \$332,750.98 based on the contract and award under that contract recited in the statement, or, whether its demand is for the sum of \$421,453.42 on the quantum meruit for the value of the items shown on exhibits C and D attached to statement of claim."

We are unable to agree with the defendant. There does not appear to be any sound reason why a plaintiff should not declare in two counts; and we understand that the Superior Court has decided that he may do so in *Winters v. Mourer*, 1 Sup. Ct. 47.

If the contract between plaintiff and defendant is valid, then the only remedy of plaintiff was to proceed before the arbitrator and it is concluded by his award. Then the first count of this statement of demand is the only one upon which the plaintiff can recover, because that count is upon the award, and suit is brought because the defendant has refused to pay the same.

But, if for any reason the said contract is invalid, and we were informed at the argument the United States Circuit Court of Appeals had so decided (although that is not now before us), then the award is a nullity and the plaintiff cannot make it the basis of this action.

Therefore the plaintiff is relegated to his action for the materials furnished to, and for the work and labor done for, the defendant, which is the basis of the court in this statement of demand upon a *quantum meruit*. What then is to prevent the plaintiff from proving its whole claim of \$421,453.42 before the jury, if it can, just as it attempted to prove it before the arbitrator? Nothing that we can see, if the contract and the award upon it are void, because, in that event, the award is a mere nullity and cannot stand in the way of anyone. It might result in the defendant's being obliged to

pay more money than if it had accepted the award, but that does not appear to be a legal reason for sustaining this demurrer.

We must not be understood as now ruling the question, whether or not the plaintiff can prove the larger sum at the trial, because that question is not now before us. We are only passing upon the validity of this demurrer. The defendant can surely state, in its affidavit of defense, whatever defense it may have to the count upon said award, and can, at the same time, state whatever defense it may have to the count for materials furnished and for work and labor done.

The demurrer of defendant is overruled and the defendant is ordered to answer over.

For plaintiff, *Reed, Smith, Shaw & Beal*.

For defendant, *Willis F. McCook*.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### BOROUGH OF BELLEVUE v. UMSTEAD.

*Municipal liens—Sheriff's sale—Divesting—  
Act of June 4, 1901.*

All liens against real estate are divested by a judicial sale unless clearly presented by some statute.

The act of June 4, 1901, while giving priority to municipal claims does not preserve the lien until fully paid, and a lien filed under that act is divested by a sale on a mortgage although the sale only realizes the costs.

No. 504 July Term, 1906. Case stated.

Opinion by FRAZER, P. J. Filed January 21, 1908.

In substance, the facts agreed upon are as follows: Frederick Dillemath, being the owner of a lot of ground situate on Rodgers avenue in the borough of Bellevue, conveyed the same to defendant Umstead by deed dated September 22, 1899, and to secure unpaid purchase money took a mortgage upon the property. By assignment the mortgage became the property of George H. Quail, October 30, 1902. By virtue of proper municipal authority, Rodgers avenue was graded and paved during the year 1900, and on May 28, 1902, a lien was filed against the Umstead lot for benefits accru-

ing from the improvement, which the viewers fixed at \$168.35. On December 12, 1903, a *sci. fa.* was issued upon the purchase money mortgage above referred to, judgment obtained thereon, and the property sold by the sheriff February 4, 1903, on a *lev. fa.* issued thereon, George H. Quail becoming the purchaser for the sum sufficient only to pay costs of suit. The question for determination is, did that sale divest the borough's claim for benefits assessed against the property for the improvement of Rodgers avenue? We are of opinion that it did. In the first place, it is a well settled rule that all liens against a property are divested by judicial sale unless clearly preserved by an act of assembly. *Shaw v. City of Allegheny*, 115 Pa. 46. The act of May 16, 1891, P. L. 69, expressly preserved municipal liens "until fully paid and satisfied." That act, however, was repealed by the act of June 4, 1901, P. L. 364, which latter act is now in force, and was at the time of the sale in this case the law governing such liens. While that act gives municipal liens priority in payment out of the proceeds of a sheriff's sale, it does not preserve and continue the lien until fully paid as did the act of 1891. The borough's lien, therefore, not having been preserved by the act of 1901, or any law in force at the time of the sale on the mortgage, it was discharged, and the purchaser took the property free of the claim. This conclusion is strengthened by the enactment of the amendatory act of May 28, 1907, P. L. 280, in which it is expressly provided that liens for taxes and municipal claims shall not be divested by any judicial sale, except to the extent that the proceeds of such sale are applied to the claim. The evident purpose of this act was to renew to municipal claims the protection previously afforded by the act of 1891. If such were not the case, and such claims were not divested by judicial sales, the act was unnecessary and presumably would not have been passed.

Being of the opinion that the plaintiff's lien against defendant's lot was divested by the sale on the prior purchase money mortgage in question, judgment is entered on the case stated in favor of defendant, with costs.

For plaintiff, *David L. Starr.*

For defendant, *George H. Quail.*

## Court of Common Pleas,

WASHINGTON COUNTY.

MALONE v. MOUNTS.

*Wills—Legacy—Charge on land.*

Testator devised all his real estate to his son A for life with remainder to the two sons of A. He further bequeathed to his daughter B "the sum of \$600 to be paid to her by my son A as follows, viz.: \$100 to be paid to her in one year from the date of my decease and \$100 each year thereafter until all is paid, the same to be without interest until due and payable."

By the terms of the will there was no blending of the real and personal estate, and although A was given the personal estate absolutely, the testator left none. Within a year after the death of the testator A died without paying any part of the legacy, and the real estate accordingly vested in his two sons. Held, that the legacy was not a charge on the land, and at most was a mere personal obligation on the part of A, for which suit in *assumpsit* would lie and in satisfaction of which his life estate could have been levied upon and sold.

No. 188 February Term, 1908. Case stated.

Opinion by TAYLOR, J. Filed January 20, 1908.

The only question presented to the court for decision by this case stated is whether or not a certain legacy is a charge on land.

Adam Malone devised all the real estate of which he died seized to his son, Adam Taylor Malone, for life, then the remainder over to his two sons, namely, Joseph Henry and Harry Clinton Malone, the plaintiffs in this case stated. The said Adam Malone in paragraph fourth of his will bequeathed to his daughter Margaret:

"Now intermarried with Joseph England, the sum of six hundred dollars to be paid to her by my son Adam Taylor Malone, as follows, viz.: One hundred dollars to be paid to her in one year from the date of my decease, and one hundred dollars each year thereafter until all is paid, the same to be without interest until due and payable." The said Adam Taylor Malone died without having paid the said legacy to Margaret England, and the title to the real estate of Adam Malone, the testator, being now vested

in the plaintiffs, is the legacy bequeathed to the said Margaret England a charge on their land?

"To make a legacy a charge upon land it is necessary that it shall be declared to be so by express words, or that it may be inferred from the whole will that such was the intention of the testator." *Montgomery v. McElroy*, 3 W. & S. 370. The language used by the Supreme Court in this opinion is a correct statement of the law of Pennsylvania.

On the argument of this case counsel for defendant admitted that it could not be claimed that there was any express words in the will of the testator which declare the legacy to Margaret England to be a charge on the real estate devised to Adam T. Malone and his sons Joseph Henry and Harry Clinton Malone. The language of the will is simply a plain direction to pay this legacy to his daughter by his son, Adam Taylor Malone: "I will and bequeath to my daughter Margaret, the sum of six hundred dollars to be paid to her by my son Adam Taylor."

From this plain direction and from the whole will can an intention to make the legacy to Mrs. England a charge on the land "be inferred"?

The direction in the will is that Adam Taylor Malone shall pay the legacy. According to the will the first instalment was payable "in one year from the date of my decease," but no provision is made for payment of the first instalment in the event that Adam Taylor Malone should die within one year of the death of his father. In that event his estate in the land was ended. His sons take title, not through him, but through the will, yet there is no direction that the sons should pay any part of the legacy, either the first or any subsequent instalments. If payment of the first instalment may have been avoided by the death of Adam Taylor Malone, the conclusion is inevitable that the whole legacy must fall, unless the language shows that all or any part of it shall be assumed by the sons. *Cabel's Appeal*, 91 Pa. 327; *Van Vliet's Appeal*, 102 Pa. 574; *Walter's Appeal*, 95 Pa. 305; *Harworth's Appeal*, 105 Pa. 362; *Espy's Estate*, 207 Pa. 459; *Penny's Appeal*, 109 Pa. 323.

It is a fact that the testator had no personal estate, and it is argued that that is one reason why an intention to charge the legacy upon the real estate must be inferred or implied from the fact that there was no other source out of which the legacy could be paid. It has been decided by the Supreme Court that where a testator blends real and personal estate the legatees shall look to the real estate for the payment of their legacy, the personal estate being insufficient. In the present case there was no blending of real and personal estate, the estate of Adam Taylor Malone in each was separate and distinct. In the real estate he took a life estate; while in the personal estate his interest was absolute, in the words of the will "to be his to have and to hold absolutely and entirely."

In *Van Vliet's Appeal*, 102, Pa. 574, supra, the testator devised certain real estate to his two sons, and directed that they pay certain legacies. In a subsequent clause of the will was a bequest to the two sons of the testator's personal property, with a direction to pay all the testator's debts and funeral expenses. Our Supreme Court decided that there was no blending of the real and personal estate, "hence none of the authorities applicable to a case where the property is thus blended control the case at law. The case rests on an entire omission of the testator to use any language sufficient to charge upon the land devised to the sons, the legacy given to the daughter. He directs his sons to pay the legacies, but does not charge them on the land. Something more must appear in the will than a mere direction to pay."

There was no blending of the real and personal estate in the case at bar except by a forced construction, and then the question arises in whose hands was it blended. Certainly not in the hands of the plaintiffs in this case. Their estate in the land was entirely distinct and separate from that of their father, and they took as direct devisees. If, then, the blending of the real and personal estate shows an intention that the legacy shall be a charge on the interest of any person, it would be a charge on the interest of the person in whose hands the estates were blended. And in this case that would be only a charge on the interest of

the tenant. And this being the case, the lien of the legacy cannot, in the absence of express words, or clear intention, descend upon the estate in fee, and this legacy amounts to nothing more than a mere personal obligation upon the part of Adam Taylor Malone for the payment of which suit in assumpsit would lie, and in satisfaction of which his life estate could have been levied upon and sold. *McClurken's Appeal*, 48 Pa. 211; *Hamilton v. Porter*, 63 Pa. 332; *Young's Appeal*, 108 Pa. 17.

And now, January 20, 1908, by agreement of the parties in the case stated and on the foregoing opinion of the court, judgment is ordered to be entered for the plaintiffs for the sum of \$1,331.99, the first instalment of the purchase money of said land, with interest thereon from November 1, 1907, with costs.

For plaintiff, *John H. Murdoch & Son*.  
Contra, *Duncan, Chalfant & Warne*.

[From *Harry Russell Myers, Esq., Washington, Pa.*]

### Book Notice.

MONAGHAN'S CUMULATIVE ANNUAL DIGEST OF PENNSYLVANIA DECISIONS. JAMES MONAGHAN, Editor, assisted by GEORGE M. HENRY of the Philadelphia Bar. SONEY & SAGE, Publishers, Newark, N. J.

This digest has been issued yearly since 1899. It is a digest of all Pennsylvania opinions reported during 1907. Its usefulness as a means of finding the latest reported cases in this state is now well recognized by the profession, and it needs no further recommendation. For this purpose it should be in the library of every Pennsylvania practitioner.

The fact that the right of appeal is in the nature of a privilege or favor and not a constitutional right, is again emphasized in a case recently decided by the Supreme Court of Oklahoma. The case referred to is that of *Butts v. Anderson* (91 Pacific Rep. 906, September 1907). The action was one for the enforcement of a mechanic's lien and the trial was held on March 11, 1904, resulting in a judgment for the plaintiff. The clerk, however, failed to record the judgment in the case until a year later. The

defendants filed their motion for a new trial which was overruled and time given to make and serve a case on appeal, on March 14, 1904. On March 13, 1905, defendants made another motion for a new trial, in which it was alleged as grounds therefor that after the trial of the cause and before defendants had been able to procure a transcript of the evidence submitted on the trial the court stenographer died, and no one had been found who was able to read his notes. The trial court granted a new trial upon the ground specified, which action was reversed by the court on appeal. The appellate court finds that in view of the fact that the application for a new trial did not fall within any of the grounds upon which according to the Oklahoma Code of Procedure such new trial might be granted, the award of the new trial was erroneous. The appellate court also pointed out that the record might have been preserved by other means than an official stenographer's notes, saying that it is only within the past quarter of a century that shorthand reporters have been known to the courts, and that it would be manifest injustice to the plaintiff to have the judgment vacated and a new trial ordered not for any error in the proceedings or mistake of the parties or the court officers, but because, long after the judgment was rendered, a condition arose by which the dissatisfied party was unable to perfect an appeal from a judgment which the court must presume was right and just.—*Albany Law Journal*.

Where upon motion to confirm a report recommending that a bankrupt be granted a discharge it appeared that his adjudication was in 1905, that since November, 1898, he had acted as agent for his wife under an unrecorded power of attorney, and prior to the enactment of the Bankruptcy Act, 1898, was indebted to her for borrowed money, it was held, *In re Hedley*, 19 Am. B. R. 409, that written assignments by him in 1897 and 1901, of corporate stock held in his own name, to his wife, which stock was kept in a box with other papers belonging to her, are not fraudulent as to his creditors, though the wife had no actual knowledge of the assignments, and they will not defeat his right to a discharge.

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No. 40.

PITTSBURGH, PA., APRIL 15, 1908.

## Circuit Court, United States,

WESTERN DISTRICT OF PENNA.

### BLEVINS v. THE CLEVELAND COMMERCIAL TRAVELERS' ASSOCIATION.

*Foreign corporations—Action against— Process.  
Agent—Doing business in this state.*

Plaintiff brought suit in the Circuit Court of the United States for the Western District of Pennsylvania against a beneficial organization, incorporated under the laws of Ohio, which did not have in Pennsylvania an office for the transaction of business. All the business was transacted through the main office in Cleveland, Ohio. Process were served on a vice president of the company in Allegheny, whose duties were to preside at meetings in the absence of the president and whose only other business was to solicit applications for new membership in this state, which he as well as other members did. Held, that although the defendant corporation was doing business in Pennsylvania by soliciting members, the vice president was not an executive officer within the meaning of the Pennsylvania act of 1901, relating to the service of process, nor was he such a representative of the association in Pennsylvania as to constitute him a legal agent upon whom process could be served.

No. 27 May Term, 1906. On rule to show cause why service of summons upon defendant should not be set aside.

Opinion by LANNING, D. J. (specially assigned). Filed March 19, 1908.

The plaintiff sued out a summons in this court against the defendant company and caused it to be served by the Marshal upon Mr. C. H. Kelly in the city of Allegheny, in this district. Mr. Kelly is one of the vice-presidents of the defendant company and resides at Allegheny. The defendant now applies for an order quashing the service on the ground that the defendant com-

pany is a corporation foreign to the state of Pennsylvania and does no business therein, and also on the ground that Mr. Kelly is not an agent of the defendant company on whom process against it can be legally served in Pennsylvania.

The facts, which have been agreed on by the parties, are, in substance, that the defendant is a corporation of Ohio; that it has never had an office or place for the transaction of business within the state of Pennsylvania, has never qualified itself to do business in Pennsylvania under the laws of that commonwealth, and has but one office and that in the city of Cleveland, Ohio; that it is governed by the laws of Ohio relating to the organization and control of fraternal orders, and has members in Pennsylvania whose remittances for dues are sent directly and only to the Cleveland office; that its officers are a president, five vice-presidents, a secretary, a treasurer, a sergeant-at-arms, and a board of directors; that in the conduct of its business a vice-president is authorized merely to preside at meetings of the association when the president is absent; that Mr. Kelly resides at Allegheny, and at the time of the service upon him, was one of its vice-presidents; that its members are requested by the association to solicit applications for new memberships therein, and that Mr. Kelly and other members residing in Pennsylvania have from time to time, through their solicitations, obtained such applications from residents of Pennsylvania which have been forwarded to the office in Cleveland and there accepted by the association; and that no transactions other than such as are above mentioned have, at any time, been carried on within the state of Pennsylvania.

It is a settled rule that service upon a corporation of process issued out of a federal court must be made either within the state under whose laws the corporation is organized, or within a state in which it is doing business, upon an agent representing the corporation in its business. But the mere fact that Mr. Kelly was a vice-president of the defendant company, and resided within the Western District of Pennsylvania, is not sufficient to support the service. "The residence of an officer of a corporation does

not necessarily give the corporation a domicile in the state. He must be there officially—there representing the corporation in its business.” *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 411.

The plaintiff insists that the facts agreed upon in the present case show both that the defendant is doing business within the state of Pennsylvania and that Mr. Kelly was a proper agent on whom to make the service. As to the transaction of business within the state of Pennsylvania, Mr. Kelly did nothing more, and was authorized to do nothing more, than each and every other of the members of the defendant company did or was authorized to do. He solicited applications for new membership, and that was all. Other members did the same. That, however, was business. An isolated act would not be. The stipulation of the parties declares that Mr. Kelly and the members of the defendant company in Pennsylvania, upon the request of the association, solicited applications for new memberships. Such acts increased the revenues of the defendant company and developed and strengthened its business. This case is very different from *Peterson v. Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, to which reference has been made by counsel. The defendant company here belongs to one of the fraternal orders of the present day, and the acquisition of new members in the state of Pennsylvania must, viewed in the light of the meagre facts now furnished to the court, be regarded as very important business. I think the defendant company must be considered as one doing business in the state of Pennsylvania.

But the Pennsylvania statute requires that service of process upon a corporation shall be “by handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk or other executive officer, personally.” See P. L. 1901, p. 614. Mr. Kelly is neither president, secretary, treasurer, cashier, nor chief clerk. Nor is he an executive officer except when, in the absence of the president, he presides at a meeting in Cleveland, Ohio. He is never an executive officer in the state of Pennsylvania. Therefore, the service made

does not comply with the provisions of the Pennsylvania statute.

Nor do I think it can be upheld under the authority of the doctrine announced in *Barrow Steamship Company v. Kane*, 170 U. S. 100. There, jurisdiction of the Circuit Court of the United States for the southern district of New York was sustained in a case where the plaintiff was a citizen of New Jersey and the defendant a corporation of the Kingdom of Great Britain, notwithstanding no statutory authority for the service of process in any such case existed. Service was made, however, upon the regularly appointed agents of the corporation in New York, where the corporation was carrying on business. Service upon a corporation, to be valid, must be upon some agent authorized in law to receive it in behalf of the corporation. In the present case, Mr. Kelly's authority in Pennsylvania was none other than that of the remaining members of the defendant company residing in Pennsylvania. Unless service upon any member of the defendant company who had solicited applications for membership in Pennsylvania would be valid service upon the corporation, I cannot see why service upon Mr. Kelly should be. It is not reasonable to infer that every member of a fraternal society who resides in a state other than that in which the society has been incorporated, and who labors to build up that society by increasing its membership, is an agent of the society on whom process against the society may be served. The agent must have a representative character distinct from that of general membership. *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 611-615; *St. Clair v. Cox*, 106 U. S. 350, 359. I think Mr. Kelly's relation to the defendant company was, in Pennsylvania, that of a general member only. He had no such official relation to the business of the association in Pennsylvania, and was not such a representative of the association in Pennsylvania as constituted him the legal agent of the association to receive judicial process in that state.

The rule must therefore be made absolute. For plaintiff, *Dunn & Moorhead*. For defendant, *A. O. Fording*.

**Court of Common Pleas No. 4,  
ALLEGHENY COUNTY.**

**In re Petition to Strike Off the Names  
of the District Officers, Third Dis-  
trict, Twelfth Ward, Pittsburgh.**

*Primary election law—Common Pleas—Man-  
damus—Jurisdiction.*

Under proper averments the Common Pleas has power to issue writs of mandamus, in cases arising under the Primary Election Act of February 17, 1906.

No. — Second Term, 1908.

**PETITION.**

"The petition of John Welsh, a qualified Republican elector of the Twelfth ward of the city of Pittsburgh, respectfully represents that in the third district of the Twelfth ward of the city of Pittsburgh, Allegheny county, Pennsylvania, the following candidates appear, to wit: Jos. Wilson, Andrew Shirley, C. W. Sypniewski, Jos. Hooker, John Lauton, Michael Donnelly, and David Stewart, for the various officers and committees.

"Your petitioner further represents that the electors, whose signatures appear upon the said petition, did not sign the said petition, and that the aforesaid signatures appearing upon the said petition were not written by and are not the true signatures of the said electors, but that the aforesaid signatures were written by one and the same person.

"Your petitioner therefore asks and prays the honorable judges to restrain the county commissioners from printing the names of the candidates for the various district offices and committees, and that the petition filed be thrown out on the grounds of irregularity."

Opinion by SWEARINGEN, P. J. Filed April 1, 1908.

This petition is filed by John R. Welsh, in which he alleges that he is a qualified Republican elector of the Twelfth ward, Pittsburgh. He avers that in the third district of said ward "the following candidates appear, to wit: Jos. Wilson, Andrew Shively, C. W. Sypniewski, Jos. Hooker, John Lauton, Michael Donnelly, and David Stewart, for the various offices and committees."

He then alleged that the electors "whose signatures appear upon the said petition" did not sign said petition, but that their signatures were written by one and the same person.

He therefore prays this court "to restrain the county commissioners from printing the names of the candidates for the various district offices and committees, and that the petition filed be thrown out on the grounds of irregularity."

If this is intended as a petition for a writ of mandamus directed to the commissioners of Allegheny county, as it appears to be, it is not in conformity with the act of June 8, 1893, P. L. 345, known as the "Mandamus" Act, either in form or in substance, as a reading of the first four sections of the act will disclose. For example: This petition does not show for what offices these persons, whose names he desires the commissioners to be restrained from printing, are candidates, nor where the petitions are which he desires thrown out. It does not show any demand upon the commissioners to perform any act or duty, or any refusal by them to perform any act or duty. It does not show what, if any, beneficial interest the petitioner has in the result. And it does not show that the petitioner is without other adequate and specific remedy at law. These are some of the things which are required by said act to be set forth in a petition for a writ of mandamus. In these respects this petition is not in compliance with the requirements of the statute. It is too vague, uncertain and indefinite.

We have already held, in the case of *Com. ex rel. Stevenson v. Commissioners*, No. — Second Term, 1908, that the common pleas has the power to issue writs of mandamus to the county commissioners in cases arising under the Primary Election Act. But the question in this case is one of the sufficiency of the petition for a writ of mandamus.

If the purpose of this petition is to invoke the aid of the court in some form of proceeding, other than mandamus, we have not been referred to any statute which authorizes us to grant the relief. It is not pretended that any such power is given us by the Primary Election Act of 1906.

We have been referred to the case of *Com.*



*ex rel. v. Blankenberg*, 218 Pa. 339, as authority. But, as appears from the report of that case, it was a proceeding for a writ of mandamus. Presumably, the petition in that case was in compliance with the requirements of the Mandamus Act. The case is not authority for any form of proceeding other than that of mandamus.

We are unanimously of opinion that this petition should be refused.

For petitioners, *Englert & Stadlander*.  
Contra, *John S. Weller*.

(Common Pleas No. 4, Allegheny Co.)

**In re Petition to Strike Off the Names of the District Officers, Fifteenth District, Twenty-First Ward, Pittsburgh.**

*Primary election law—Common Pleas—Petition of candidates—Jurisdiction.*

The Common Pleas has no jurisdiction, under the Primary Election Act of February 17, 1906, to strike names off petitions of candidates, which are filed pursuant to said act.

No. — Second Term, 1908.

**PETITION.**

"The petition of David D. Davies, a qualified Republican elector of the Twenty-first ward of the city of Pittsburgh respectfully represents that in the fifteenth district of the Twenty-first ward of the city of Pittsburgh, Allegheny county, Pennsylvania, the following candidates appear, to wit: John C. Goettman, C. K. Babbett, Fred Moesta, H. C. Kennedy, G. P. Adler, Walter D. Graham, I. Truxell for the various district offices and committees.

"Your petitioner further represents that Chas. Moesta, whose signature appears upon the said petition, is not a registered elector of the said district, and is therefore not a qualified elector.

"Your petitioner further represents that H. Moesta, whose signature appears upon the said petition, is not a qualified Republican elector of the said district, and is not a member of the Republican party.

"Your petitioner further represents that the said petition does not contain the requisite number of qualified electors, as prescribed

by the act of assembly, and your petitioner therefore asks and prays the honorable judges to refuse to print the names of the candidates for the various district offices and committees, and that the said petition be thrown out on the grounds of irregularity."

Opinion by SWEARINGEN, P. J. Filed April 1, 1908.

We are unanimously of opinion that this court is without jurisdiction to grant the relief for which the complainant prays in the petition filed in this case. No jurisdiction is conferred by the act approved February 17, 1906, P. L. 36, and we have not been referred to any other act which does confer jurisdiction. Even if the act of 1893, known as the Ballot Act, does give us power to interfere in such a case as this, as was argued, these proceedings were not taken within the time prescribed by that act.

The petition is therefore refused.

For petitioners, *Englert & Stadlander*.  
Contra, *John S. Weller*.

**Court of Common Pleas No. 2,  
ALLEGHENY COUNTY.**

**RODGERS SAND COMPANY v  
PITTSBURGH, CARNEGIE &  
WESTERN RY. CO. et al.**

*Mechanics' liens—Amendment of parties—  
Railroads—Merger.*

Land was deeded to the A railroad and it later merged with the B railroad, the title to the land still standing on the records in A's name. X filed a mechanics' lien against A and later asked to substitute B as the defendant. The time for filing had expired, but all notices had been served on B. Held, the amendment should be allowed.

M. L. 7 July Term, 1907. Sur petition for leave to amend mechanics' lien.

Opinion by SHAFER, J. Filed March 7, 1908.

The lien was filed against the Pittsburgh, Carnegie & Western Railway Company as owner. It now appears that the land, or at least the greater part of it, upon which the building stands, was conveyed to the last

named company, and that no conveyance out of that company is of record, but that before the erection of the building in question this railway company was merged with one or more others into the Wabash Pittsburgh Terminal Railway Company, which latter company made the contract with the contractor named in the lien for the erection of the building, and was in possession of the building with all the other property of the Pittsburgh, Carnegie & Western Railway Company at the time the building was erected, and has pending a rule to strike off the lien because not filed against the true owner. The plaintiff has thereupon presented the present petition for leave to amend by naming the Wabash Pittsburgh Terminal Railway Company as owner, it appearing that the notices required by the mechanics' lien law were served upon the latter company, or at least came into its possession. The mechanics' lien law provides for amendments and gives the plaintiff a right to amend, with the provision, however, that, after the time for filing has expired, no amendment shall be allowed which substitutes "a wholly different party as the defendant with whom the claimant contracted." As pointed out by plaintiff's counsel, this exception to the right of amendment is somewhat peculiarly worded. Taken literally, this exception would not apply to the present case, as the claimant is a sub-contractor who alleges that he contracted with the Monongahela Construction Company as contractor, and he is not endeavoring to substitute another party as the defendant with whom he contracted, but to substitute another party as owner of the building. Upon a first view of the matter, it would seem that the legislature intended to except from amendments made after the time for filing the lien, defendants generally. If this is the meaning, however, the words "with whom the claimant contracted" would be of no effect. We are inclined to believe that the act means precisely what it says—that a claimant shall not be allowed to amend by substituting a different party as the person with whom he contracted, that being a matter at all times within his own knowledge, but that as to parties with whom he did not directly deal, he should be allowed to amend; which

amendment, of course, could not affect intervening rights.

But, however this may be, we are of opinion that the substitution of the Wabash Pittsburgh Terminal Railway Company, into which the Pittsburgh, Carnegie & Western Railway Company was merged, is not a substitution of a wholly different party. The Wabash Company has title to the land, simply because a deed was made to the Pittsburgh, Carnegie & Western Railway Company, it being admitted that no conveyance was made from the latter to the former.

The amendment is therefore allowed as prayed for.

For plaintiffs, *Carpenter & Chalfant*.

For defendant, *Willis F. McCook*.

(Common Pleas No. 2, Allegheny Co.)

### FRASER v. FIRST CONGREGATIONAL CHURCH OF PITTSBURGH.

#### *Real estate—Sale—Fixtures.*

In the sale of a church the question whether the organ, pulpit and pews are fixtures and pass with the realty, depends on the intention of the congregation at the time they were placed, that is, was it the intention that they should remain there permanently or temporarily? The question is one for the jury under proper instructions.

No. 780 October Term, 1905. Sur motion ex parte defendant for new trial and judgment in its favor non obstante verdicto.

Opinion by FRAZER, P. J. Filed February 4, 1908.

Plaintiff purchased from defendant its church property on Fifth avenue, Pittsburgh, for the sum of \$——. Subsequent to the sale, defendant removed from the building and sold to another congregation for the sum of \$1,000 the organ, pulpit and pews. Plaintiff then brought this action to recover the amount received by defendant for the articles enumerated, less certain credits for insurance which plaintiff admitted owing defendant. The verdict was in favor of plaintiff. The principal question involved in the proceeding was whether or not the organ, pulpit and pews were fixtures and passed to

plaintiff with the building. Whether they were or not, it seems to us under the authorities, depends upon the circumstances under which they were placed in the building; whether they were physically annexed to the realty or not is immaterial, the ruling question being the intention of the congregation at the time the articles were placed in the building. Was it the design or intention at that time that the articles remain there permanently or temporarily? If the former, title to them passed to plaintiff; if the latter, it did not. What that intention was, seemed to us to be a question of fact, and was submitted to the jury for determination. *Electric Light Co. v. Goodman*, 129 Pa. 212; *Seeger v. Pettit*, 77 Pa. 440. An examination of the authorities cited by counsel has not convinced us that we were in error in so doing. The other reasons urged in support of these motions have been considered and do not seem to us to be well founded. An examination of the testimony and rulings thereon and also our charge, satisfies us the case was submitted to the jury as favorably to defendant as it had a right to expect. A new trial and judgment for defendant non obstante veredicto must therefore be refused.

And now, February 4, 1908, new trial and judgment for defendant non obstante veredicto refused.

For plaintiff, *Watson B. Adair*.

For defendant, *Diamond & Zacharias*.

### Court of Common Pleas,

DAUPHIN COUNTY.

#### COMMONWEALTH ex rel. CARSON, v. STATE BANK OF PITTSBURGH.

*Bank and banking—Deposit—Misrepresentation of cashier—Measure of damage—Act of 1876.*

Exceptants claimed in the distribution of the funds of the State Bank of Pittsburgh as depositors by virtue of a certificate signed and delivered by the cashier. The auditor had found that no deposit had been made either in cash or by the discount of a note and that the certificate was false. Contended, however, by the exceptants that even if there had been no deposit in fact made, yet they

were entitled to recover from the bank, because they had been deceived and misled to their loss by the misrepresentation of the cashier. Held, that recovery on such ground was limited to actual loss, and as the claim did not arise out of the fact that a deposit had been made, it was subsequent to the claims of the depositors who under the act of 1876 were first entitled to be paid.

No. 23 Commonwealth Docket, 1904.  
Exceptions to report of auditor.

Opinion by KUNKEL, P. J. Filed December 18, 1907.

The exceptants, Colborn & Robinson, claimed to share in the distribution as depositors. They offered, in support of their claim, the following certificate, which was delivered to them by the cashier of the state bank:

"PITTSBURG, PA., July 8, 1903.

"This is to certify that the State Bank of Pittsburg holds in escrow Ten Thousand Dollars (\$10,000), to be distributed according to the terms of contract and prospectus of W. R. Hackert, Colvin & Robinson, C. E. Smith, and D. Paul Hughes, of even date; said contract and prospectus made a part of this consideration.

"LOUIS KLEIN, Cashier."

They also offered in evidence the written contract mentioned in the certificates, by the terms of which the \$10,000 deposit was to be forfeited to Colborn & Robinson and C. E. Smith if D. Paul Hughes, who was to make the deposit, should fail to comply with the terms and conditions of the contract. Claiming that the forfeiture had taken place, the exceptants demanded payment of the certificate out of the fund for distribution.

The auditor has found that, as a matter of fact, no deposit was made in the bank, either by cash or by the discount of a note, and that the certificate was false. The books of the bank failed to show that any deposit of cash was made, or that any note was discounted by the bank in connection with the transaction, save that in the minutes, kept by Klein the cashier, of the meeting of the directors, held July 7, 1903, the day before the date of the certificate, there was the minute:

"Following notes were discounted:

"Wm. H. Whitfield, End. John Heppel,

200—4 Mo.; Heilman Bros., J. H. Elder & R. J. Kingan, 1475—2 Mo.; J. C. Fulton, D. Hartbauer, 75—90 Da.; W. A. Scott, Jr., 40 shares Mfgs. L. & B. Co., 1000—4 Mo.; W. C. Connelly, Jr., D. Paul Hughes & W. A. Merritt, 10,000. To be held in escrow."

The directors present at the meeting, however, testified that no such note as that last stated was passed upon by them, and both W. A. Merritt and W. C. Connelly, Jr., also testified that they did not sign such a note. Klein, the cashier, did not appear before the auditor, and D. Paul Hughes was dead. Under all the evidence, we think that the learned auditor was fully warranted in his finding.

But it is contended by the exceptants that even if there was no deposit in fact made, yet they are entitled to recover from the bank, because they were deceived and misled to their loss by the misrepresentation of the cashier. They have not, however, made any proof of the amount of their loss, but claim the whole amount represented to have been deposited. Conceding that they would be entitled to recover for the loss which they suffered by reason of the misrepresentation of the cashier, who was the agent of the bank, upon the principle that where one of two innocent parties must suffer by the act of a third person, the one who held that person out as worthy of trust and confidence, and as having authority in the matter, should sustain the loss, yet it does not follow that they may claim as depositors, or the amount of the alleged deposit. Upon this theory their claim would not arise out of the fact that the deposit was made, for it was not made, but out of the misrepresentation of the bank's agent, and recovery would be limited to their actual loss. They, therefore, would not be entitled to receive, necessarily, the amount of the certificate, or a dividend upon that amount. Nor would they be entitled to be paid out of the fund which is now being distributed. The fund is not sufficient to pay in full all the claims of the depositors, and, by the direction of section 28 of the act of May 13, 1876, P. L. 161, it must be first applied to them. The claim, we think, was properly disallowed. The exceptions to the auditor's report are, there-

fore, overruled, the report is confirmed, and distribution is directed to be made in accordance therewith.

For exceptions, *L. C. Barton.*

Contra, *Marron & McGirr.*

(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

### Effect of Discharge in Bankruptcy on Assignments of Future Earnings.

It rests in the nature of things that there can be no "title" to non-existent property. Nevertheless, where future property, if it come into existence at all, must come as the product of something presently owned, our law has, in certain instances, imputed to the owner of a potential possession of the non-existent property, which possession is conceived to be subject to present transfer. *Grantham v. Hawley*, Hob. 132; *Hull v. Hull*, 48 Conn. 250. The right of the assignee of a non-existent chose in action has sometimes been confused with that of the purchaser of such future property. His right, however, rests on an entirely different basis. The earlier common law even refused to give effect to assignments of existing contractual rights. Eventually the rights of such assignor and assignee were worked out on the principle of an irrevocable agency in the latter to collect and retain to his own use the obligation owed to the assignor. This doctrine has marked theoretical and practical advantages, but it is to be observed that it makes possible the effectual "assignment" of a right not yet in being, without imposing even the limitations of the fiction of potential possession. However, the courts, apparently impressed by the fact that public policy is opposed to permitting one to mortgage himself too far into the future, have declined to give effect to assignments of future wages unless to be earned in an employment existing at the time of assignment. *Herbert v. Bronson*, 125 Mass. 475. See *Kane v. Clough*, 36 Mich. 436; *Garland v. Harrington*, 51 N. H. 409. This subject has been brought into some prominence by a recent conflict of authority. When an assignment of wages to be earned under an existing employment is given as security for a loan, and the assignor thereafter receives his discharge in

bankruptcy, the question arises whether or not the assignee may collect wages earned by the assignor after the discharge. It has been held (*Mallin v. Wenham*, 209 Ill. 252, 258), that the assignee had, at the time of bankruptcy, a valid lien on the future wages which is preserved by the bankruptcy act, Sec. 67d, 30 Stat. at L. 564. The three other cases (*In re West*, 128 Fed. 205; *In re Home Discount Co.*, 147 Fed. 538, 547; *Leitch v. Northern Pacific Ry. Co.*, 95 Minn. 35) dealing with the problem hold that such an assignee can have no lien until the wages have been earned, and therefore that at the time of discharge there is no valid lien to be preserved. The Supreme Court of Massachusetts has recently held that such an assignment operated to transfer potential possession of the wages to be earned after bankruptcy, and that the assignee therefore had, at the time of the discharge, a valid lien. *Citizens' Loan Ass'n v. Boston, etc.*, R. R. Co., 82 N. E. 696.

All of these cases seem to overlook the nature of the so-called "assignment" of choses in action. A power of attorney to collect wages which may chance to be earned in the future, cannot with propriety be spoken of as a lien, even though given as security for a present obligation. On the other hand, there appears to be no provision in the bankruptcy act which can operate to disturb this agency of the assignee. Indeed, it is recognized that such powers of attorney to collect choses in action which were in existence before the bankruptcy, survive the discharge: *Stedman v. Gassett*, 18 Vt. 346; *Hayes v. Pike*, 17 N. H. 564. Cf. *In re Oliver*, 132 Fed. 588. It seems to follow that such a power of attorney must equally be effectual to permit the assignee to collect the bankrupt's after-acquired choses in action. The weight of the objection to this rule founds itself on "the spirit of the bankruptcy laws." Undoubtedly the dominant purpose of such enactments is to appropriate the whole of the debtor's present property to the payment of his debts and to permit him to retain his future earnings as against former creditors. See 2 Bl. Comm. 471, 472.—*Harvard Law Review*.

An ingenious marriage contract not to be

performed until the death of the young lady's mother, presumably to avoid any disagreeable interference by the mother-in-law with the connubial bliss of the wedded pair, is revealed in the case of *Bailey v. Brown*, 88 Pacific Reporter, 518. Judge McLaughlin, of the California Court of Appeals, who filed a concurring opinion in the case, intimates that a breach of such contract did not constitute a cause of action. He asked the question, "How could a contract to marry exist when the promisor might never be under an obligation to marry the promisee, and vice versa?" and continued: "If this good mother should live to a very ripe old age, as mothers sometimes do, no human could tell what might happen. Either of the parties might be waiting for the other, harp in hand, beyond this vale of tears, or both might pine away and die before this promise of future connubial bliss could ripen into a cause of action enforceable in earthly courts."

The Supreme Court of the United States has recently held, in the case of *Bluthenthal v. Jones*, 19 Am. B. R. 288, that where upon the objection of a creditor having a provable debt, the bankrupt is denied his discharge, but in a subsequent bankruptcy the same creditor intentionally remained away from court and the bankrupt was granted his discharge without objection, an action upon said debt, if it is a dischargeable one, is barred, where the ground upon which the first discharge was refused does not appear.

The county court of Steuben county in *Benson v. American Illuminating Company*, 102 New York Supplement, 206, upholds the right of an electric light company to shut off the current without liability to the customer, where after the company has wired an office for light the customer makes defective connections with other wires, causing danger by fire, and refuses to remedy it. Under such circumstances, whatever damages the customer suffers by being deprived of light is due to his own fault, and not to the fault of the company.

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PITTSBURGH, PA., APRIL 22, 1908.

## Court of Common Pleas,

DAUPHIN COUNTY.

**COMMONWEALTH ex rel. TODD,  
Attorney-General, v. IRON CITY  
TRUST COMPANY.**

*Equity—Jurisdiction—United States Circuit  
Court—Banking corporations—Appointment  
of receiver by United States Circuit Courts  
and states courts—Act of February 11, 1895.*

Certain citizens of Ohio presented in the Circuit Court of the United States for the Western District of Pennsylvania their bill in equity against a Pennsylvania banking corporation, alleging that they were contract creditors of the defendant, and praying for the appointment of a receiver, asserting the inability of the defendant to convert its assets into cash and meet its obligations, to which bill defendant filed an answer admitting the truth of the allegations. Upon the application of the attorney-general of Pennsylvania in the state court for the appointment of a receiver and the winding up of the business of the defendant company, it was held,

First, that a simple contract creditor, having no lien on the property of the defendant by judgment or otherwise, has no standing in the Circuit Court to prosecute a bill for the appointment of a receiver.

Second, that the act of February 11, 1895, P. L. 4, was intended to provide a complete system of supervision and control for banking corporations, and in the interest of public welfare should be held to be as exclusive as is the control of national banks by the Federal government and that the Circuit Court had no jurisdiction.

No. 430 Commonwealth Docket, 1907.  
Bill in equity for the appointment of receiver.

Opinion by McCARRELL, J. Filed February 20, 1908.

This is an application made November 20, 1907, upon the relation of the attorney-

general of the state acting in pursuance of information submitted to him by the banking commissioner of the commonwealth for the appointment of a receiver and the winding up of the business of the Iron City Trust Company of Pittsburg, Pa., upon the allegation that said defendant company is in an unsound and unsafe condition, and is insolvent.

The application is made under the provisions of the act of February 11, 1895, P. L. 4, and the proceeding is instituted under section 9 of said act.

From the testimony taken at the hearing upon the rule to show cause on December 19, 1907, we find the following:

On October 23, 1907, W. D. McKeefrey, N. J. McKeefrey, and W. D. McKeefrey, partners, doing business under the name of McKeefrey & Company, alleging that they were citizens and residents of Leetonia, O., presented their bill of complaint in equity to the Circuit Court of the United States for the Western District of Pennsylvania, the said bill being filed in said court on said day to No. 30, November term, 1907.

The bill alleges that the complainants are creditors of the defendant, the defendant being indebted to W. D. McKeefrey in the sum of \$3,151.52, and to the firm of McKeefrey & Company in the sum of \$32,049.59, and averring that these sums are respectively due and owing by the said defendant to the complainants, respectively.

The bill of complaint further alleges, as follows:

"That the defendant, the Iron City Trust Company, is a corporation organized and existing under the laws of Pennsylvania, having its office and place of business in the city of Pittsburg, Pa., and is engaged in receiving and holding moneys on deposit and in trust, and doing a general banking and trust company business, in accordance with the laws of Pennsylvania in said cases made and provided."

The bill further alleges that "plaintiffs' claims exceed the sum of \$2,000 over and above interest and costs, and the assets of the defendant consist of about \$175,000 in cash and other assets exceeding \$4,000,000, which assets are largely in excess of its liabilities, but cannot be converted into cash

in time to meet the liabilities as they mature."

The bill further avers that "upon the defendant's failure to meet its obligations, it will, unless its assets are properly protected by an officer of this court, be subject to vexatious and costly litigation, its assets will be subject to attachment and execution, and in the event of a forced sale will bring very much less than their fair and reasonable value, all of which will be to the great prejudice of your orators and to all other creditors and the stockholders of the defendant, and your orators verily believe that unless the court will take defendant's property into its custody and deal with it as a single trust, such property will be sacrificed and the stockholders and creditors, and all other parties in interest, will suffer irreparable damage and loss."

The bill then prays for the appointment of W. L. Abbott and H. S. A. Stewart as receivers of the property of the defendant and an order requiring defendant's officers to forthwith transfer, convey and turn over and deliver to the receivers all of the real and personal property, business, assets and effects of whatsoever kind and nature belonging to defendant.

Upon the same day, October 23, 1907, and apparently at the same time when the bill of complaint was presented, the corporation defendant presented and filed its answer to the said bill. This answer "admits as true all the statement of facts in said bill of complaint, and it admits that, although having assets very largely exceeding all its liabilities, it is not able to convert said assets into cash as rapidly as said liabilities will mature, and it therefore joins in the prayers of the bill and prays that your honorable court will appoint receivers as therein asked for, to the end that all of the creditors of your respondent may be paid in full without loss and sacrifice of its assets and so as to preserve the same for its stockholders as well."

It thus appears that the appointment of receivers by the Circuit Court of the United States for the Western District of Pennsylvania was not the result of any controversy between the complainants in said bill as citizens and residents of the state of Ohio,

but that the said receivers were appointed in pursuance of the concerted action of the complainants and the defendant company, and that the appointment of said receivers was practically the result of an agreement between the complainants and the defendant.

At the hearing the commonwealth offered in evidence certified copies of the bill of complaint above referred to, and the answer thereto of the defendant and the order of the Circuit Court made upon the said bill and answer.

To the petition and application of the attorney-general filed in this court November 20, 1907, the defendant company made answer on December 2, 1907, admitting that it is a corporation of Pennsylvania, with its office in the city of Pittsburgh, Pa., denying that it "is in an unsound and unsafe condition, and denying that it is insolvent," and averring that its assets, exclusive of furniture, equipment and supplies, on October 23, 1907, were of the value of \$4,740,449.59; that its liabilities to depositors were \$1,545,814.27; that its other debts, exclusive of capital, were \$263,000; and that it therefore had an excess of assets over creditors' claims of \$2,931,635.32.

The answer further avers that because of the failure of the Westinghouse companies and the Security Investment Company on October 23, 1907, and the financial stringency then existing, it was unable "to secure currency to meet the demands of its depositors," and it was then "deemed prudent and advisable to discontinue deposits and payments on that date."

The answer further avers that in consequence of this condition receivers were appointed by the Circuit Court of the United States for the Western District of Pennsylvania on October 23, 1907, and that said receivers had taken possession of all the properties and assets of the defendant company and "are duly administering the same and converting them into cash, and within one month of their appointment they have reported \$391,000 for distribution, and under all normal conditions all depositors will be paid in full within six months."

The answer further avers that the defendant company "is not engaged, and does not intend to engage, in business beyond liqui-

dating its assets and liabilities," and claim "that there is no justification or need for receivers to be appointed by this court."

At the hearing December 19, 1907, before this court the defendant company called H. S. A. Stewart, one of the receivers, who testified that he considered the defendant was solvent on October 24, 1907, when he took possession as receiver, and that the difficulty which resulted in the appointment of receivers by the Circuit Court was simply that the defendant had not the currency to meet demands of depositors, and could not get cash for its own deposits in New York banks.

He further stated (page 12) that he did not consider the defendant either unsafe or unsound, and that upon examination he found its financial condition on October 23, 1907, to be as follows, to wit: Assets, \$4,395,259; liabilities to creditors, \$1,549,086.42, leaving an excess of assets over creditors' claims of \$2,846,172.58.

Mr. Stewart also testified (pages 13 and 14) that the plaintiffs in the bill of complaint, filed in the United States Court, while then depositors of the defendant company, were liable upon promissory notes held by the defendant company for amounts larger than their respective deposits.

The defendant also called as a witness Joseph A. Knox, assistant treasurer of the Fidelity Title and Trust Company of Pittsburgh, who testified (page 18) that from an examination made by him of the assets and liabilities of the defendant company he believed the defendant on October 23, 1907, "to be perfectly solvent, having assets very considerably in excess of its liabilities."

On page 20 he testifies, as a result of his examination, that the financial condition of the defendant company on October 23, 1907, was as follows, to wit: Assets, \$4,161,467.81; liability to creditors, \$1,586,712.54, leaving an excess of assets over liabilities to creditors of \$2,574,755.27.

He further testified that his estimate of assets and liabilities was a very conservative one.

On page 21 he says that he regards the defendant company as safe and sound, and that it could do business if it chose to do so.

He further states that the stock of the defendant company, after payment of all liabilities to creditors, is worth, in his opinion, \$128.75 per share, the par value of each share being \$100.

Upon these proofs the defendant company contends that it is not insolvent; that it is not in an unsafe or unsound condition, and that no receivers can properly be appointed by this court.

The commonwealth contends that the defendant company is insolvent within the meaning of the act of February 11, 1895, and that the fact that the defendant company ceased to do business on October 23, 1907, and secured the appointment of receivers, who are closing up its business, is sufficient proof that the defendant company is not in that safe and sound condition which justifies its continuing in business.

The commonwealth further contends that the appointment of receivers by the Circuit Court of the United States in the manner and under the circumstances hereinbefore mentioned, was an appointment not within the jurisdiction of the court making said appointment, and that the control and management of the winding up of the business of the corporation defendant is under the act of February 11, 1895, solely within the jurisdiction of this court, and that receivers should now be appointed for the purpose of receiving the assets and closing the business of the corporation defendant, and that a decree should now be entered dissolving the said corporation defendant and appoint receivers to wind up its business.

It is manifest from all the testimony submitted that on October 23, 1907, the defendant company was not in condition to meet and pay its obligations to depositors as they were demanded, and the conclusion seems to be inevitable that at that time the corporation defendant was insolvent in the technical and legal sense of that word and within the meaning of the act of February 11, 1895. The admitted fact that the corporation defendant practically voluntarily ceased to do business on October 23, 1907, warrants the conclusion that the defendant did not then regard itself as in a safe and sound condition to continue business, and



that it actually was not then in a safe and sound condition to do or continue business.

If it were not for the appointment of receivers by the Circuit Court of the United States for the Western District of Pennsylvania on October 23, 1907, and the placing of the property of the defendant company in the hands and under the control of said receivers, to be administered and applied by said receivers, under the direction of said court, the right of the commonwealth to now ask for the dissolution of the defendant company and the appointment of receivers by this court to wind up its business would apparently become a question.

The important question therefore to be considered and decided is whether the action of the Circuit Court of the United States for the Western District of Pennsylvania, as hereinbefore mentioned, is of such character as to deprive the commonwealth of the decree which is now asked.

The commonwealth contends that the said Circuit Court, under all the circumstances connected with this case, had no lawful jurisdiction to entertain the bill of complaint or appoint receivers thereunder.

The lawful jurisdiction of said Circuit Court as limited and defined by the act of Congress, approved September 24, 1789 (1 Stat. at L. 79), has been modified by the act of Congress, approved March 3, 1875 (18 Stat. at L. 470), entitled "An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts and for other purposes."

This act was further amended by the act of Congress, approved March 3, 1887, and was further changed by act of Congress, approved August 13, 1888, so that at present it reads as follows:

"That the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or

petitioners, or in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." 4 Fed. Stat., Ann. 265.

The general object of the act of March 3, 1875, and its supplements, as appears upon its face and as has been often declared by the courts, is the contract not to enlarge the jurisdiction of the Circuit Courts of the United States.

In discussing the act of March 3, 1875 (18 Stat. 470 and its supplements), Chief Justice Fuller, in *Mexican Nat. R. R. v. Davidson*, 157 U. S. 208, says:

"This change was made in accordance with that intention to restrict the jurisdiction of the Circuit Courts, which has been so often recognized by this court. *Smith v. Lyon*, 133 U. S. 315-319; *In re Penna. Co.*, 137 U. S. 451; *Hanrich v. Hanrich*, 153 U. S. 122. In *Hanford v. Davies*, 163 U. S. 279, Mr. Justice Harlan uses the following language: 'It is well settled that as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleading, but the averments should be positive. These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States.'"

The plaintiffs in the proceeding instituted by them in the Circuit Court of the United States for the Western District of Pennsylvania came into that court and filed their bill in equity, alleging that they were simple contract creditors of the corporation defendant. The testimony before us clearly indicates that while they were nominal creditors as depositors, they were actually and really

indebted at the time of the filing of their bill to the corporation defendant upon unmatured notes in an amount exceeding their deposits, and that in reality they were not creditors but debtors.

Their right as simple contract creditors, even if it be conceded that they were such, to institute and maintain this proceeding in equity in the United States Circuit Court is apparently questionable.

In *Hollins v. Briarfield Coal and Iron Co.*, 150 U. S. 378, Mr. Justice Brewer uses the following language, to wit:

"The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claim; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedy in the Federal courts cannot be obliterated by state legislation."

This decision has been uniformly followed in the Federal courts.

In *Jacobs et al. v. Mexican Sugar Co.*, 130 Fed. Rep. 589, it was clearly held by Judge Archbald that "a simple contract creditor having no lien by way of pledge or otherwise on the property of the defendant company, and his claim not having been reduced to judgment, has no standing in this court to prosecute the present bill, the state to the contrary notwithstanding."

In *Canton Roll and Machine Co. v. Rolling Mill Co. of America*, 155 Fed. Rep. 321, it was held by Judge Dayton that the judiciary act of March 3, 1875, "Does not enlarge the right of an individual to sue and confers no right upon a simple contract creditor to maintain a creditor's suit in a Federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the property afford basis for such a general creditor's suit, since such lien, if valid, may be enforced in rem against the property regardless of conveyances

whether prior or subsequent."

In each of the two cases last cited there is a full and able discussion of the right of a simple contract without any specific lien to institute proceedings in equity in the courts of the United States, and the conclusion announced in each of these cases is supported by numerous Federal authorities.

There is no Pennsylvania statute giving the simple contract creditors of banking corporations or trust companies the right to proceed in equity against such corporations or companies for the appointment of receivers.

The Pennsylvania statute of February 11, 1896, P. L. 4, was enacted for the purpose of placing all such corporations and companies under the control of a separate department of the state government, and subjecting them to the supervision of the banking commissioner of the commonwealth. This statute was intended to provide a complete system of supervision and control of such corporations and companies, and in the interest of the public welfare should be held to be as exclusive as is the control of national banks by the Federal government. It is important to the public that this system of supervision and control should be exercised without hindrance by the department of the state government to which the legislature has committed this work. The public interests can be more fully protected by holding, as we do, that this statute was intended to preserve to the state through its banking department and its banking commissioner the exclusive supervision and control of these corporations and companies.

While the policy of the law and the comity properly existing between courts of concurrent jurisdiction preclude us from deciding whether, under all the circumstances of this case, the Circuit Court of the United States for the Western District of Pennsylvania had lawful jurisdiction to entertain and pass upon the bill in equity filed in that court against the corporation defendant, we feel constrained, in order that the purpose of our state statute may be followed and carried out, to grant the application made by the commonwealth of Pennsylvania through her attorney-general in the present case.

We cannot, of course, confer upon the receiver whom we may appoint authority to take possession of the property and assets of the defendant corporation now in the possession of the receivers as officers of the Circuit Court of the United States for the Western District of Pennsylvania, but the receiver appointed by us will be by virtue of the appointment in position in a proper and orderly way to invite the attention of the Circuit Court to all the circumstances attending the proceeding commenced therein on October 23, 1907, against this defendant, and we have no doubt but that said Circuit Court will then reach such conclusion and enter such judgment as under all the circumstances of this case may be right and proper.

From the testimony submitted to us, we find that the Iron City Trust Company of Pittsburgh, Pa., the defendant herein, was on October 23, 1907, according to its own admissions and acts, not in a safe and sound condition to do business, and was then, in contemplation of law, insolvent, and that this condition still continues.

We therefore now order and decree that the Iron City Trust Company of Pittsburgh, Pa., the defendant herein, be and is hereby dissolved and its corporate existence ended, and that Mr. J. Denny Lyon of Pittsburgh, Pa., is hereby appointed receiver of all its property and assets of whatsoever nature and kind, and direct that he institute such proceeding in the Circuit Court of the United States for the Western District of Pennsylvania as may be proper to procure the revocation of its decree appointing receivers for said defendant corporation, and upon its revocation to take possession of the property and assets of said defendant corporation, close its business and dispose of its property and assets in such manner as the law may require. Bond with approved security to be given by said receiver in the sum of \$500,000.

For plaintiff, *M. H. Todd*, attorney-general.

For defendant, *W. F. McCook* and *W. C. Farnsworth*.

**Court of Common Pleas No. 2,**  
**ALLEGHENY COUNTY.**

**D. J. KENNEDY CO. v. WABASH  
PITTSBURGH TERMINAL RAIL-  
ROAD CO.**

*Mechanics' liens—Failure to give notice—Striking off lien—Act of June 4, 1901.*

A mechanics' lien will be stricken off the record where it appears that no notice of the intention to file a lien was given as required by the eighth section of the act of 1901.

M. L. 21 July Term, 1907. Sur rule to strike off lien.

Opinion by FRAZER, P. J. Filed March 4, 1908.

Plaintiff as sub-contractor furnished to the Monongahela Construction Company as general contractor certain material for use in the construction of a building for defendant, for which a claim was filed for \$148.77 at the above number and term. The date upon which the last material was furnished, as appears by the statement attached to the lien, was October 17, 1906. This lien was filed April 17, 1907. No notice of intention to file a lien was served upon defendant. A notice, however, was served upon the company's attorney of the filing of the claim on April 25, 1907. We are asked to strike off the lien (1) because no notice of intention to file was given, and (2) because the service of notice of filing the claim upon the company's attorney was an improper service. The 8th section of the act of June 4, 1901, P. L. 434, provides as follows:

"Any sub-contractor intending to file a claim, must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, the kind of labor or materials furnished and the date when the last work was done or materials furnished. Such notice and statement must be served at least one month before the claim is filed and within three months after the last of his work was done or materials furnished," etc.

The object of the notice provided for in

the section quoted is to protect the owner from making payments to the contractor when his property is liable to be subjected to a lien. *Este v. R. R. Co.*, 27 Superior Court 525. It is a condition precedent to the validity of the lien and the failure to give it not only deprives the owner of the benefit of that provision in his favor, but also deprives the sub-contractor of his right to a lien. *Wolf Co. v. R. R. Co.*, 29 Superior Court 443. Without a preliminary notice that is at least a substantial compliance with the requirements of the act, there can be no valid lien.

Plaintiff having failed to give notice of intention to file its claim, as required by the eighth section of the act of 1901, the lien is invalid and should be struck off.

And now, March 4, 1908, rule absolute.

For plaintiff, *Carpenter & Chalfant*.

For defendant, *Willis F. McCook*.

(Common Pleas No. 2, Allegheny Co.)

### HAEFNER v. TOTTEN.

*Oil and gas lease—Non-payment of rentals—  
Forfeiture—Surrender.*

An oil and gas lease provided that lessee should commence a well or pay a certain sum per month until a well was commenced, and a failure to drill or make payment should render the lease void. The lease also provided that lessee might surrender it at any time.

In an action for rentals it was held that the non-payment did not render the lease void, except at the option of lessor, and in the absence of an allegation in the affidavit of defense that the lease had been surrendered, judgment should be entered for the plaintiff.

A statement made to lessor that the lease was void owing to non-payment of rentals did not operate as a surrender.

No. 250 October Term, 1905. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed March 7, 1908.

The action is upon two oil leases made by the plaintiff, as lessor, with the defendant, as lessee, in each of which the lessee agrees to commence a well within a certain time, and in case of failure to do so, agrees to pay

a certain sum per month until a well shall be commenced, and that "a failure to commence one well or to make such payment within the time above mentioned renders this lease null and void and to remain without effect between the parties hereto, and not binding in any manner whatsoever upon either." It is also provided that the lessee shall have the right at any time "to surrender this lease," and thereby be fully discharged from all claims. The affidavit of claim avers that rental was paid for a certain time; that thereafter no rentals were paid for the reason that the defendant elected to exercise the right given him to refuse to pay rentals, by reason of which refusal, the lease was to be null and void. He further alleges that the attorney of the plaintiff was told by the defendant that the conditions of the leases had not been complied with, and that by reason of the non-payment of the rentals they were null and void, and that the plaintiff made no claim; and that the leases were cancelled. It is not alleged that the leases were surrendered to the plaintiff. It was held in the case of *Galey v. Kellerman*, 123 Pa. 491, and many succeeding cases that the failure to pay rentals under the circumstances set out in this case, did not constitute in itself a termination of the lease, but only gave the lessor a right to forfeit if he chose to do so.

The defendant might, of course, have relieved himself from further liability by surrendering the lease, but he has not alleged a surrender or any facts which amount to one.

The rule must therefore be made absolute.

For plaintiff, *A. E. Weger*.

For defendant, *Stone & Stone*.

### Judicial Restrictions on the Legislative Power of Taxation.

It is well settled by the courts, both state and federal, that taxation must be for public purposes: *Cole v. La Grange*, 113 U. S. 1. In some cases this conclusion is based on express or implied constitutional provisions: *Lowell v. Boston*, 111 Mass. 454, 461; *Trustees v. Boone*, 93 N. Y. 313. But in a number of leading cases it is not so based: *Loan Ass'n v. Topeka*, 20 Wall. (U. S.)

655; *Calder v. Bull*, 3 Dall. (U. S.) 386, 387. It is there drawn from question-begging theories of the nature of legislation, from supposed implied reservations of private rights in the so-called social compact made at the establishment of government, and even from the common dictionary definition of taxation. These sources are clearly questionable. It seems, however, that the doctrine of these cases was established, not on account of its constitutional or logical necessity, but because it was very desirable and because the courts, being regarded as guardians of private rights even when not secured by constitutional provisions, were ready to declare unconstitutional statutes infringing such latent rights. In the assumption of such power the courts seem to have encroached on the functions of the legislature by defining without constitutional requirement the purposes for which it seems wise or politic to tax.

After establishing the public purposes of taxation, whether properly by force of a constitutional provision or improperly by encroaching on the powers of the legislature, courts further usurp legislative prerogatives by refusing to declare taxing acts public, the purposes of which do not fall within a restricted and artificial definition: *Phila. Ass'n v. Wood*, 39 Pa. 73. This usurpation affects all legislative taxing acts for purposes lying between the restricted definition and the reasonable and liberal definition which the legislature should be allowed to follow. To justify the courts in declaring a tax void, the absence of all possible public interest should be so clear that no reasonable man could consider it promotive of the public welfare: *City of Minneapolis v. Janney*, 86 Minn. 111; *Broadhead v. Milwaukee*, 19 Wis. 624. If such taxation is unjust or excessive, the only security for correction is the legislative body. See *Bank v. Billings*, 4 Pet. (U. S.) 514, 563. Ultimately the responsibility will rest where it ought—on the electors. This seems good politics and, moreover, respects our tripartite form of government.

A class of cases involving these principles are the decisions as to the constitutionality of state acts taxing insurance companies for the benefit of disabled firemen. When ap-

plying only to foreign insurance companies such statutes have been sustained as police regulations: *Trustees v. Boone*, supra; *Fire Dept. v. Helfenstein*, 16 Wis. 136. But other cases have more correctly held that, as the revenue purpose is more important than the regulative, the imposition is a tax: *Phoenix Assurance Co. v. Fire Dept.*, 117 Ala. 631; *San Francisco v. Ins. Co.*, 74 Cal. 113. As a tax, it has been held invalid as offending not only against specific constitutional provisions, but against the latent rights and reservations above mentioned. On the other hand, it has been held valid, as well under the most liberal conception of the legislative power of taxation as under the requirement of public purposes. A recent South Carolina case regards such a tax as not for public purposes and consequently invalid. *Aetna Fire Insurance Co. v. Jones*, 59 S. E. 148. Had the court followed the Alabama case (*Phoenix Assurance Co. v. Fire Dept.*, supra) which it misconceived and which seems the most satisfactory case on this subject, the statute would have been considered within the powers of the legislature. For it is clear that there is the possibility that such a tax promotes the public welfare. It is not, therefore, a question of right for the courts, but a question of policy for the legislature—*Harvard Law Review*.

Down in Cochran, Ga., the affairs of civil justice are administered by Judge Edwards, who is also an enthusiastic farmer. One cloudy spring afternoon court was convened to try a peculiarly tortuous and perplexing case. Judge Edwards listened with growing unrest. He was observed at last to seize a slip of paper, scribble a few words, place the document beneath a heavy paper weight and reach for his hat.

"Captain," he called, cheerily, "excuse me fur interruptin' you, suh; you go right on with your argument, which is a darned good one. It's suah goin' to rain this evening, gentlemen, an' I got to set out my potatoes right away. But you go right on, Captain! when you an' the Major get through you-all'll find my decision under this heah paper weight."

The door closed upon an astonished orator. —*Nashville Banner*.

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No. 42.

PITTSBURGH, PA., APRIL 29, 1908.

## Court of Common Pleas No. 4, ALLEGHENY COUNTY.

### COMMONWEALTH ex rel. STEVENSON v. PRICE et al.

*Primary election law — Candidate — Ballot —  
Request of candidate — County commissioner.  
Mandamus.*

Under the Primary election law of February 17, 1906, a candidate for office who desires to have printed on the official ballot something more than his name, must present his request for it at least three weeks prior to the day fixed for holding the primary election. A candidate under this law has the right to invoke the aid of the courts to enforce his rights by mandamus.

No. 1067 Second Term, 1908. Petition for mandamus.

Opinion by SWEARINGEN, P. J. Filed April 1, 1908.

The relator is a candidate, in the Thirtieth Congressional District of Pennsylvania for National delegate to the Republican National Convention, at the primary election which is to be held on April 11, 1908. His petition therefor was filed with the county commissioners of Allegheny county on March 12, 1908. Subsequently, to wit: March 25, 1908, he filed with said commissioners a formal request, that they print on the official ballot, at the right of his name, "that A. B. Stevenson favors Theodore Roosevelt as the Republican candidate at the National Convention at Chicago in June, 1908." This request was made pursuant to the Act, approved February 17, 1906, (Primary Election Act) P. L. 36.

The relator has filed this petition for a writ of mandamus directed to said county commissioners, the respondents, in which, after alleging the foregoing, he avers that the respondents refuse to comply with his

said request, and he prays that a writ of peremptory mandamus may issue to enforce compliance therewith.

The respondents voluntarily appeared in open court, by their counsel, A. B. Hay, Esq., the county solicitor, waived all formalities and requested a speedy decision, without further pleadings; and the cause was argued before a full bench.

We are of opinion that the relator, being a candidate for National delegate, at the ensuing primary election, has the right to invoke the aid of this court by mandamus to enforce his rights. The right which he claims is expressly given to him by the said Primary Election Act of 1906, provided he has complied with its terms.

The respondents object that the relator's "request" was not filed with them three weeks (21 days) before the date fixed for the primary election, to wit, April 11, 1908. The relator avers that no time is fixed in the act, within which such a "request" must be filed, and therefore it may be filed at any reasonable time before the ballots are printed.

The single question before us, therefore, is whether or not the relator's request was filed in time.

It is true the act does not expressly name any time within which such a "request" must be filed with the county commissioners. But it is specific in pointing out what must be done in order to prepare an official ballot. It requires the commissioners to publish the names of all offices for which nominations are to be made and candidates for party offices to be elected, commencing eight weeks before the primary election is to be held, and to continue such publication for three successive weeks. Then the act provides:

"The said petitions, in the case of candidates for Congress or for state offices, shall be filed at least four weeks prior to the primary with the secretary of commonwealth; and in all other cases shall be filed, at least three weeks prior to the primary, with the county commissioners of the respective counties."

Finally, the commissioners are required to "have on file in their office, at least one week preceding the primary election, open

to public inspection, forms of the ballots with the names printed thereon, which shall be used in each election district within such county." This allows two weeks to the commissioners within which to prepare the data and have the ballots printed and ready for inspection. In a large county like Allegheny, this cannot be said to be an unreasonable time.

It seems to us that the meaning of the act is that everything, including petitions and requests, must be on file in the office of the county commissioners, three weeks prior to the date fixed for the primary election. There is as much reason for requiring these "requests" to be filed, three weeks before the primary, as there is for requiring petitions of candidates to be filed at that time. There must be a rule. We think the rule as to filing "requests" is, by analogy to the rule as to filing petitions, fixed by the act itself. That is certain and definite. It cannot work any hardship upon a diligent candidate. We cannot think it was intended to leave the subject uncertain and indefinite, dependent upon ability or disposition to prepare the ballot for public inspection.

We are unanimous in our opinion that the fair and reasonable construction of the act is that such a "request," as the relator has filed, ought to be presented three weeks prior to the date fixed for holding the primary election. Admittedly, the relator's request was not filed until after the expiration of that period, and therefore it was not filed in time.

The petition for a writ of mandamus is refused.

For relator, *Thomson & Thomson*.

For respondents, *A. B. Hay*.

(Common Pleas No. 4, Allegheny Co.)

### MAYHUGH v. WAY.

*Attorney and client—Fees—Contract for—Suit to recover—Evidence.*

A person entered into a written contract to pay as counsel fees a certain percentage of the amount to be collected for her as heir to an estate, which percentage was admittedly fair and reasonable, and in pursuance of the contract received her share of the estate less the amount agreed upon

for fees. In a suit to recover part of the amount retained by the attorney under the contract, on the ground of its being excessive and upon the further allegation that she was assured that she was to pay a fair and reasonable fee only, the jury will be instructed to return a verdict for the defendant where it appears from the plaintiff's admissions that the contract was signed by her without fraud or coercion; that defendant had never acted as counsel for plaintiff prior to the signing of the contract in question and that the accounting had been in accordance with the contract.

No. 401 Third Term, 1907. Motion and reasons for new trial.

Opinion by SWEARINGEN, P. J. Filed January 7, 1908.

The history of this case is substantially this. William Altsman died possessed of an estate which amounted to over \$40,000. He left no lineal descendants. Proceedings of escheat the estate were commenced by the Commonwealth of Pennsylvania. The plaintiff, her three sisters and one brother and the representatives of a deceased brother, claimed to be the next of kin of the decedent. William A. Way, Esq., a member of the Bar of Allegheny county, was employed by these parties to establish their claims as next of kin. This was in March, 1901. They were successful in their contest; and Mr. Way collected for each of these claimants \$6,157.17. He paid to the claimants the amounts coming to them about May, 1902. Of the amount found to be due the plaintiff, Mr. Way paid her the sum of \$3,538.23 on April 28, 1902, and the balance of \$500 on May 5, 1902, making a total of \$4,038.23 which was received by the plaintiff.

In order to understand the course which the case took at the trial, it is necessary to refer briefly to the pleadings.

On May 20, 1907, the plaintiff brought this action. In her statement of demand, which was filed May 31, 1907, the plaintiff claimed to recover from the defendant the sum of \$2,157.17. She alleged that she had "employed W. A. Way, the defendant, who is an attorney . . . to act for and in her behalf in the recovery" of her share of the estate of William Altsman, deceased, (without stating when she employed him)

"for which she was to pay him, as she was assured and told, a fair and reasonable fee," averring that she was unable to read and write. She then alleged that there was distributed to her the sum of \$6,157.17, that she received from the defendant the sum of \$4,000 on October 28, 1902, and that she found afterwards (not stating when) that defendant had retained the balance for services rendered. She finally alleged that defendant had retained said balance and had refused "to pay the same over, although often demanded and solicited to pay her what was justly and honestly due her." The plaintiff therefore demanded of the defendant the sum of \$2,157.17, with interest from October 28, 1902.

To the foregoing statement of demand the defendant filed an affidavit of defense. He averred that the contract of employment was in writing, dated March 20, 1901, and he attached a copy thereof, marked Exhibit "A." In this contract it was recited, *inter alia*, that whereas the commonwealth of Pennsylvania had commenced proceedings to escheat the assets of the estate of William Altzman for want of lawful heirs, that said heirs (including plaintiff) desired to secure counsel and resist said proceedings, and "are not in a position to pay counsel fees for such purpose." It was then agreed that defendant be retained as counsel "to represent the interests of the undersigned in said estate, as next of kin or otherwise, as they may be entitled, and that he shall perform all needful and proper services as such counsel and that the next of kin shall defray any actual court costs or expenses necessary for the proper prosecution of their said claims, which shall be borne by said parties proportionately to their several interests, and as his compensation the said William A. Way shall receive the one-fifth part of all assets of said estate, eventually distributed to the undersigned next of kin." This contract bore the signature of the plaintiff, her brother and two sisters.

After averring the settlement of said dispute with the commonwealth, a decree to each of the claimants of \$6,157.17, and a full explanation to the claimants (including plaintiff) of said settlement and acquiescence thereto by them, the affidavit of defense

proceeded to aver that the funds in the hands of the administrator were paid in two installments; that plaintiff's share of the first was \$4,422.79, which was immediately paid to her, less defendant's compensation according to said contract, whereby each received \$3,558.23; that a few days afterwards, the final balance in the hands of the administrator was paid to defendant and thereupon on May 5, 1902, "a final accounting was made by defendant to plaintiff and to the other claimants represented by him, and a copy of this account was delivered to plaintiff." A copy of the account was attached and made a part of the affidavit of defense, marked "B." The affidavit of defense then stated: "And thereafter on the same day, plaintiff acknowledged receipt from defendant of the sum of Five Hundred (\$500.00) Dollars, which, together with the amount of Three Thousand Five Hundred and Thirty-eight and Twenty-three One Hundredths (\$3,538.23) Dollars already paid plaintiff by defendant, was full settlement of all moneys due plaintiff from the estate of William Altzman, as per statement rendered to plaintiff, hereinbefore referred to as Exhibit 'B,' and a copy of this receipt is hereto attached, marked 'C' and made a part of this affidavit."

To this affidavit of defense the plaintiff did not file any replication.

It will be observed that, on the one hand, the plaintiff averred that she had employed the defendant as her attorney (without stating when or how), that he had collected a large amount of money for her, and that he had kept more than one-third of it as compensation and had refused to account; and on the other hand, the defendant denied her allegations and averred that his employment was in writing, dated March 20, 1901, that he had collected the money, and that he had fully accounted and paid over everything. And there was no replication. Such were the issues as presented by the pleadings.

At the trial the plaintiff was given every opportunity to prove her allegation respecting the employment of the defendant as her attorney. She made every effort possible to establish the relation of attorney and client, outside of the written contract, but all her efforts were futile. She did not testify that



the defendant had ever been her counsel prior to that time. She did not testify that she had ever talked with him, that she had ever even seen him, prior to the making of the contract, or that he was even present when it was executed. The plaintiff was finally driven to admit the written contract. A paper was shown to her, and she distinctly admitted that she had executed it and that it was necessary for her to obtain counsel to collect her money from the Altsman estate.

And that paper, when produced and marked "Exhibit I," is found to be the very contract between the defendant and next of kin of William Altsman, deceased, a copy of which marked "A" is attached to the affidavit of defense. It follows that the plaintiff's statement of demand did not contain "a concise statement of" her claim, as required by the act of 1887 and the supplements thereto.

Consequently the issues shifted. There was, therefore, no question to be left to the jury, respecting the contract of employment. The writing was set forth in the affidavit of defense. There was no denial of it in the pleadings, except inferentially. There was no averment anywhere that it was unfair or unconscionable, or that it had been obtained by fraud, by accident or by mistake. And finally the plaintiff, when on the witness-stand, admitted its execution. That paper was, by the testimony of the plaintiff herself, notwithstanding her sworn statement of demand, the very contract whereby the defendant was employed as her counsel, and with it, and with it alone, the relation between them of attorney and client commenced.

Upon the other branch of the case, the plaintiff when on the witness-stand admitted that she had received the defendant's check ("Exhibit 2") for \$3,538.23, which was her share of the first payment in the Altsman estate, and had obtained the money. This was the first payment to her, as set forth in the affidavit of defense.

Then she admitted the receipt of "Exhibit 3," which is as follows:

"WM. A. WAY.

No. 1334.

"PITTSBURGH, PA., 5-6, 1902.

"FORT PITT NATIONAL BANK.

"Pay to the order of Mrs. Emily Mayhugh Five Hundred and no 100 (\$500) Dollars. Full and final settlement Altsman Est. as per statement May 5, 1902.

"WM. A. WAY, Attorney.

"Endorsed:

"MRS. EMULY MAYHUGH her (X) mark.

"Witness: AMOS MAYHUGH."

And finally she admitted the execution of "Exhibit 4," which is the final accounting and her receipt to defendant in full settlement of moneys due her in the estate of William Altsman, deceased. And this "Exhibit 4" is the original of Exhibits "B" and "C" attached to and made a part of the affidavit of defense. All of this took place on May 5, 1902.

This "Exhibit 4" is a full and complete statement of all that was done and of all the moneys paid by the defendant. There was no denial of it anywhere in the pleadings. The plaintiff admitted that she had received and retained the money, which was paid to her in pursuance of the same.

These exhibits, 2, 3 and 4, were offered in evidence by the defendant. The only question then that could be at issue was the conclusiveness of the settlement. No denial of these papers appeared in the pleadings, no averment, that they were executed or obtained through fraud, accident or mistake. What was the testimony?

These papers, Exhibits 3 and 4, were not presented to the plaintiff by the defendant. He was not present when they were executed; he did not induce her to execute them. They were sent to her, not by a stranger, but by her own nephew, the son of another claimant, who was also a party to the contract, "Exhibit 1." There was some contention that this nephew, Charles S. Newell, was the agent of the defendant. But there was no evidence whatsoever to support that contention, outside of the fact that he carried the papers, and this was not sufficient. Mr. Newell took these papers to the plaintiff's house. Her husband, who can read and write, was there. In the presence of her nephew and of her husband, the papers were executed by the plaintiff. Her husband signed her name and witnessed her mark to the check, "Exhibit 3," and

that check is marked "full and final settlement Altsman Est., as per statement May 5, 1902," which is the accounting shown as "Exhibit 4." And who could protect the plaintiff's interest better than her own husband? It is true the plaintiff testified that she did not understand the papers, but she distinctly admitted that she did not ask anyone to read them to her. What more could the defendant have done? He sent the papers to the plaintiff so that she could have the benefit of independent advice; and she did have the assistance of her husband, who acted with and for her. She took the money on May 5, 1902, and has retained it ever since. She alleged, under oath, in her statement of demand, that she had "often demanded and solicited" the defendant to pay said balance to her; but she did not at the trial offer one syllable of proof of that fact. There was not the slightest testimony that she had ever raised any objection to the settlement, or that she had ever given any intimation of dissatisfaction to the defendant, or had made any demand upon him, prior to the bringing of this action on May 20, 1907, more than five years after she executed the release and obtained her money. Said averment, in the statement of demand, is, under the evidence produced, not true.

But what was wrong with this accounting of May 5, 1907, "Exhibit 4?" It does not show that the defendant himself received one dollar of compensation more than he was entitled to receive, under the contract. In fact, it might be a question whether or not he received as much as he was legally entitled to receive. The other payments were made, pursuant to the contract, or, as shown on their face, pursuant to agreement of the plaintiff.

The only offer in rebuttal by the plaintiff was to show that she had paid \$100 to Charles S. Newell, in full for his services, at the time she received her first payment. Under objection this offer was rejected. This offer was not rejected because the testimony ought to have been introduced in chief, as alleged in one of the reasons for a new trial, but because we were of opinion that the offer was incompetent.

But how did the facts contained in this offer impugn the settlement between the

plaintiff and defendant? That settlement shows that the defendant paid Mr. Newell \$179.91 for services in the case. This was in pursuance of the clause in the contract, "Exhibit 1," which provided that "the next of kin shall defray any actual court costs or expenses necessary for the proper prosecution of their said claims." It was, therefore, an authorized payment, unless the defendant knew that Mr. Newell had been previously paid; and there was no offer to show that defendant had such knowledge.

We were, therefore, of opinion, at the close of the testimony, that there was no question of fact to be submitted to the jury, and the jury was accordingly directed to return a verdict for the defendant.

On this motion for a new trial, the plaintiff's counsel strongly contends that the defendant was acting as attorney for plaintiff and that he cannot be protected by any settlement made with her. We entirely agree with counsel respecting the duty which an attorney owes to his client. *Uberrima fides* is the rule; and its enforcement ought never to be relaxed in the slightest degree. But what is the application of the rule to the pleadings and evidence in this case? When did the relation of attorney and client begin? Certainly not until the delivery of the contract of March 20, 1901, "Exhibit 1." No such relation existed at the time of the execution of the contract. Surely no court can say, from an inspection, that this contract is unfair or oppressive. And there is not the slightest evidence that it is unfair or unreasonable.

And when did the relation of attorney and client end? When the defendant accounted and paid the money to the plaintiff, of course. That was on May 5, 1902. At that time, or within a reasonable time thereafter, the plaintiff ought to have objected, if there was anything in the settlement with which she was dissatisfied. She cannot receive the fruits of her counsel's labor, without objection, retain the same for five years, without an intimation of disapproval, and then repudiate the settlement; after the recollection of events has faded and witnesses have departed. It is all well enough to insist on the duty which an attorney owes to his client. But the client equally owes a

duty to his attorney. It is his duty, when an accounting is tendered, to examine it, to demand an explanation, if it is not understood, and to promptly object to what is not satisfactory. After waiting five years, the plaintiff cannot be heard to say, I did not understand the settlement; it was her duty to demand an explanation at the time. She cannot now be heard to say, I could not read the statement; it was her duty to demand that it be read to her at the time.

The authorities, relating to the execution of documents by illiterate persons and to the testimony which is required to avoid them, are very clear. The rule was admirably stated by Chief Justice Gibson, in *Greenfield's Estate*, 14 Pa. 489:

"If a party who can read will not read a deed put before him for execution; or if being unable to read will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law."

And this is the doctrine of the cases subsequent thereto. *Pennsylvania Railroad v. Shay*, 82 Pa. 198; *Hicks v. Harbison Walker Co.*, 212 Pa. 437; *Rinker v. Etna Life Insurance Co.*, 214 Pa. 611.

The plaintiff's counsel contend that the case of *Szok v. Crown*, 33 Sup. Ct. 612, rules this case. But we are unable to see that it does. In that case, a contract was made and the relation of attorney and client established. When the money was paid, the client was dissatisfied, and promptly so notified his attorney. Suit was brought by the client, and the attorney defended on the ground, that another contract had been made, subsequent to the original. The client denied this, and of course that question had to go to the jury upon the testimony, which was oral. But that is not this case at all.

The two cases also cited by the plaintiff: *Mullen v. Kelley*, 125 Federal Reporter 212, and *Herman v. Metropolitan Street Railway Company*, 121 Federal Reporter 124, do not, in our opinion, rule the questions in this case as they were presented.

We have re-examined this case with extreme care to see that no injustice has been done the plaintiff. We are satisfied that none has been done her, and the motion for a new trial is overruled.

For plaintiff, Wm. M. Price and John H. McCloskey.

For defendant, Patterson, Sterrett & Acheson.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### WUNDERLICH et al. v. PENNSYLVANIA RAILROAD CO.

#### Railroads—Smoke and dirt—Damages.

An action against a railroad for damages caused by smoke, dirt and vibration cannot be sustained in the absence of proof that defendant's road was operated in an unlawful manner.

No. 100 October Term, 1905. Sur motion to take off non-suit.

Opinion by SHAFER, J. Filed March 28, 1908.

The action is by the owner of a house in the city of Pittsburgh which immediately adjoins the right of way of the defendant company, and the plaintiff's claim is that by reason of the heavy freight trains which are run on defendant's road, the operation of the road causes the house of the plaintiff to vibrate and shake, the cellar walls to crumble and fall and the plaster to loosen in the house, and causes a great noise and scatters burning cinders and dirt and dust over the plaintiff's premises. It was not contended that the mode of operation of defendant's road was in any way unlawful. We are of opinion that the case is ruled against the plaintiff by the *Pennsylvania Railroad Company v. Marchant*, 119 Pa. 541.

The motion to take off the non suit is therefore refused.

For plaintiff, D. C. Reardon and H. T. Watson.

For defendant, Patterson, Sterrett & Acheson.

## Orphans' Court, WASHINGTON COUNTY.

### In re Estate of O. F. LYON, Deceased.

Wills—Separate use trust—Termination of trust by divorce.

Testator directed the proceeds of his estate to be

equally divided among his five children at the death of his wife, the part going to his daughter A. to "remain in charge of my executors and by them placed on interest or invested in real estate as to them seems best, and the interest, rentals or profits accruing from her said share shall annually be paid to her while she remains the wife of N. J. Hair; but should she be separated from him by his death, then in the discretion of my executors she is to have the full control of it as her own absolutely." B., the husband of A., obtained on his own petition a decree of divorce a vinculo matrimonii. Held, that the trust ceased.

No. 7 February Term, 1908. Citation to executor of said estate to show cause why an account should not be filed as petitioner's trustee under the will of O. F. Lyon, deceased, and he pay over to petitioner the sums of money due her after settling the cause and expenses of the trust aforesaid.

Opinion by TAYLOR, J. Filed April 10, 1908.

The petitioner in this case is Mrs. Ella L. Iams, daughter of the decedent, who at the time of the death of the testator, was Ella L. Hair.

The testator died on the 11th day of March, 1902, after having made his last will and testament, dated the 17th day of February, 1902, which said will is recorded in the register's office of said county, Pa., in Will Book 18, page 542, wherein and whereby the testator devised, inter alia, his estate as follows:

"After the payment of all my just and lawful debts, I give all that remains both real and personal to my wife, Catherine for her use during her life time, and authorize her, in her own discretion, to at any time give to our children, out of my estate, money or other property enough to equalize them according to the statement hereto attached. After the death of my wife, and after the payment of all her just and lawful debts, then all that remains shall be equally divided among our five children, viz. Catherine J., Emma A., Ella L., William M., and Sherman L. Provided, however, that the part or share going to my daughter Ella L. Hair, shall remain in charge of my executors and by them placed on interest or invested in real estate as to them seems best,

and the interest, rentals or profits accruing from her said share shall annually be paid to her while she remains the wife of N. J. Hair, but should she be separated from him by his death, then in the discretion of my executors she is to have the full control of it as her own absolutely. And should the said Ella L. Hair die before coming into possession of her share, then one-half of it shall be given to daughter Hazel Yoders after she has reached the age of twenty-one years and the other one-half shall be given to her other children according to law. I authorize my wife and executors to sell the property at the toll gate whenever it seems best in their discretion.

"I hereby nominate and appoint my son William M. Lyon and Renz Lyon as my executors with power to sell and convey any of my property at any time the same as I could if living without any rule at court."

Letters testamentary were issued to William M. Lyon on the 19th day of March, 1902, by the register of Washington county, Pa., and he, the said William M. Lyon, entered upon the duties of said trust and has continued in the performance of the same; his co-executor mentioned in said will having renounced on account of his not having attained his majority at the time of the issuance of said letters.

At the time of the writing of the will of the petitioner's father, to wit, February 17, 1902, and until September 23, 1904, she was the lawful wife of N. J. Hair, referred to in the will of the said O. F. Lyon, her father, and that on October 22, 1905, Catherine Lyon, mother of the petitioner for citation and wife of testator, died testate.

On January 4, 1904, at No. 114 February Term, 1904, N. J. Hair, then the petitioner's husband, presented his petition to the Court of Common Pleas of Washington county, Pa., for a decree a vinculo matrimonii, and on September 23, 1904, this court granted a decree in divorce as prayed for, and the petitioner is now the wife of I. W. Iams and resides at Morgantown, West Virginia.

W. M. Lyon, the executor, still acting as trustee for the petitioner's share in said estate, refused to turn over to petitioner the balance due her in said estate, and she prays for a citation.

The facts in this case are not in dispute, counsel for the executor having filed an answer admitting them to be true as stated, but denying the legal right of the petitioner for this citation to have paid over to her the fund for which he is trustee until her first husband, N. J. Hair, from whom she was legally divorced, is dead, as stipulated in said will, and that is the sole question to be determined under this citation rule.

On the argument it was not seriously controverted that under the admitted facts the law was with the petitioner. The petitioner having been divorced from the bonds of matrimony from her husband, the said N. J. Hair, and the evident purpose under the will of the testator being to prevent his, the husband's dominion over the money in trust left to the daughter, the purposes for which the trust was created have failed and we can see no reason why under the authorities the executor should not pay over to her the trust fund.

In *Williams on Wills*, at page 139, Sec. 241, it is held: "If a married woman is given an estate of inheritance of full ownership subject to a separate use trust and the only use is to protect from her husband, and if he should happen to die, or he should be divorced from the bonds of matrimony the trust will terminate and the married woman will be entitled to conveyance of real estate from the trustee." *Peoples Savings Bank v. Denig*, 131 Pa. 241.

In *Koenig's Appeal*, 57 Pa. 352, testator directed the proceeds of all his estate to be equally divided among his children and his heirs. He appointed Koenig trustee of the share given to his daughter Ann, a married woman. He gave to the trustee for the use of his daughter and her children a house, etc., to a sum named, "And the balance of her legacy shall be put on interest for my said daughter and the interest is to be paid to her every year during her life and after her decease the house and lot of ground and the principal sum or balance of her legacy aforesaid is to go to her children. But if my daughter Nancy should survive her husband I order her trustee to overturn and assign all and everything coming to her as legacy and bequest in this will mentioned, to her and her heirs and assigns forever."

The court held that the trustee was solely to protect the trust property from the daughter's husband. The daughter was afterwards divorced and the court further held that the trust ceased.

In *Lee's Estate*, 207 Pa. 218, it is held: "Where the will of a testator places a bequest to his daughter in trust for her, the trust to end in the event of the husband's death before hers, and the sole purpose of the trust is to protect her estate from her husband, a divorce between the daughter and her husband will end the trust."

Under the admitted facts and the decisions of our appellate court the daughter of the testator, having obtained a divorce a *vinculo matrimonii* from the said N. J. Hair, who was her husband when the testator made his will and for some time after his decease, is entitled to have the executor and the trustee of the fund left in trust for her by her father's will, pay over to her said fund.

The trustee having stated an account in his answer to the citation and the petitioner, objecting to be bound by the same without an opportunity to examine after the legal question raised by the citation and answer would be disposed of, is entitled to a full account without prejudice under the account so filed.

And now, April 10, 1908, the citation is made absolute and the executor and trustee of said estate is ordered to pay over the moneys to the petitioner, held in trust by the said executor under the will of petitioner's and executor's father, the said O. F. Lyon, upon a proper accounting by him to her through the Orphans' Court of said county of the amount due and owing to her under said will.

For petitioner, *Harry Russell Myers*.

For respondent, *G. P. Baker*.

(From *Harry Russell Myers, Esq., Washington, Pa.*)

In the case of *In re Leverton*, 19 Am. B. R. 434, it has been held that a trustee in bankruptcy removed by the court for due cause will be denied his personal expenses and commissions, and also the expenses of an accountant who solicited claims for his attorney, by which the election of the trustee was controlled and the accountant chosen.

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No. 43.

PITTSBURGH, PA., MAY 6, 1908.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

**In re Application for Charter of Iron City Lodge No. 17 Improved Benevolent and Protective Order of Elks of the World.**

*Corporations not for profit—Application for charter—Infringement—Exceptions to.*

The exclusive right of a corporation to its name is one that by itself carries the presumption of injury by interference and will therefore be protected, and the use of a name by a corporation asking for a charter, though not in all respects identical with the name of an existing corporation, is an infringement upon the latter's rights if it tends to create confusion in the public mind. In such a case the intention of the incorporators is immaterial.

In this case the applicant for a charter of the Iron City Lodge No. 17 Improved Benevolent and Protected Order of Elks of the World was refused upon exceptions filed by Lodge No. 11 Benevolent and Protected Order of Elks, which had already been incorporated.

No. 84 September Term, 1907.

Opinion by MACFARLANE, J. Filed April 18, 1908.

The purposes of the proposed corporation are proper, the organization is composed of worthy citizens of this county, and the charter should be granted unless the exceptions are well taken.

They are filed by Pittsburgh Lodge No. 11 Benevolent and Protective Order of Elks, a corporation incorporated by the Court of Common Pleas No. Two of this county in the year 1891, the lodge itself having existed since 1878, and they are in short that the application is made with intent to produce confusion in the public mind in respect to the identity of the proposed corporation and that of the exceptant and is a fraud upon the exceptant, and, secondly, that the effect

of granting the charter would be to produce confusion in the public mind in respect to identity with consequent injury to the exceptant.

A third exception is that the application is contained upon more than one sheet of paper. With reference to this exception it is to be regretted that the practice of the courts of this county has been relaxed, and the rule laid down by Chief Justice Lowrie *In re Alexander Presbyterian Church*, 30 Pa. 154, would be a wholesome addition to our rules of court. The writer of this opinion endeavored to enforce that practice but found that it was not uniform and has felt obliged to content himself with recommending that it be followed. This exception is not sustained.

The date of the organization of the order of which the applicant lodge is a part does not appear, although the lodge itself was organized in 1902. It was charged in the testimony with being an imitation, and we may safely assume that had it antedated that of the exceptant the fact would have appeared. It is a palpable imitation of the other organization not only in name but in the denomination of its officers, in the insignia and emblems of the order, and it is apparent that an effort has been made to approach as nearly as possible without transgressing the line bounding the rights of the exceptant. It is to be regretted that with nearly the whole animal kingdom to choose from the applicants did not select some name not already preempted. With the enormous growth of social and fraternal organizations the time seems to be not far distant when the roll of names will be exhausted, but it is not yet at hand.

The distinguishing as well as the common appellation of the exceptants is "Elk." The members are known as Elks, their club house as "Elk's Lodge." Its members wear a small metal elk's head and the device, B. P. O. E., is used to indicate the name of the order. It is a fraternal order, and one of its principal purposes is beneficial in the aiding of sick members and the widows and children of those deceased.

The applicants' organization is in these respects identical except that the device was described by counsel as having a small

i. before and a small w. after the B. P. O. E., and their house is known as "Elks Rest." They have, of course, a perfect right to have the same purposes, and the testimony as to the other matters is important only in showing that they aid in creating the confusion which exists.

The exceptant's constitution confines the membership to persons of the white race. There is no such limitation in that of the applicant, and thus far all of its members are of the negro race. This fact, if known by the public, would prevent confusion as to which order a member belonged, but the ground of the objection made is not that the exceptant would lose members or business. It is that confusion will result, in fact has already resulted.

There is no doubt that confusion has arisen. Telephone calls to the wrong house, letters delivered to the exceptant's place intended for that of the applicant, a case of whiskey, which both parties repudiate, was delivered with the bill to exceptant's club house, and a large number of colored men have sought admission to the white men's building.

"But even without this, the authorities have settled that the exclusive right of a corporation to its name is one that by itself carries the presumption of injury by interference and will therefore be protected," Mitchell, C. J., in *American Clay Manufacturing Company v. the same*, 198 Pa. 189. Although that was a case of a manufacturing corporation, it recognizes the right in a name. A beneficial society in a sense does business, and while it is not likely, as already said, that it will lose members, the confusion in the minds of the public leading to mistakes in charging and delivering of goods, in the delivery of letters and in other ways will undoubtedly lead to financial loss. It was settled in that case that the intention was immaterial and cases were quoted and approved which held that the use of names not in all respects identical were an infringement upon the rights of those first to use them.

There are many cases in this state refusing incorporation under somewhat similar circumstances as this, but it is only necessary to quote a few. In *First Presbyterian*

*Church of Harrisburg*, 2 Grant 340, the application for a charter in that name was refused because the Chief Justice knew of the existence of the "English Presbyterian Church of Harrisburg" and he thought that each would be known as the Presbyterian Church of Harrisburg, leading to confusion. While this case would probably not now be so decided, the underlying idea has governed the courts. A charter to the "Grand Lodge of the Independent Order Sons of Progress" was refused on exceptions filed by the "Grand Lodge of the Order Sons of Progress." Judge Arnold disposing of the case in the brief sentences, "But the word 'Independent' is simply descriptive. The true name is 'Sons of Progress,' 14 W. N. C. 31. So here the word 'Improved' is simply descriptive and the names of the two organizations are practically identical. In *Polish National Catholic Church of St. Francis*, 51 Supr. Ct. 87, and *Philadelphia Lying-In Charity v. Maternity Hospital*, 29 Supr. Ct. 420, the Superior Court would not interfere with the discretion of the lower court but approved the refusal of the charters. In the first case the objecting corporations' name was the St. Francis Roman Catholic Church, that of the applicant, the Polish National Catholic Church of St. Francis. In the other the proposed name was "The Central Maternity and Hospital for Women," and that of the exceptant, "The Maternity Hospital." The court said: "The similarity of the name to that of another corporation having its hospital in the vicinity was a matter eminently proper for consideration by the court to whose sound legal discretion the application was addressed."

"St. Francis" were the prominent distinguishing words in each of the churches and "Benevolent and Protective Order of Elks" are such here.

We have considered the able argument and briefs of counsel with care, but think we have demonstrated by the decisions of our own state that our refusal of the charter is based upon sound legal discretion.

The application is refused.

For petitioners, *J. W. Holmes* and *Wm. H. Stanton*.

For exceptants, *J. E. O'Donnell* and *G. H. Stengel*.

**Court of Common Pleas No. 4,**  
**ALLEGHENY COUNTY.**

**HASELTINE v. WHITNEY.**

*Note—Married woman—Accommodation maker  
—Place of contract—Laws of Ohio relating to.*

Suit was brought by the endorsee of a promissory note which was dated at Pittsburgh, Pa, but designated no place of payment, against the accommodation maker, a married woman. The endorsement by the payee, delivery and discounting of the note all took place in the state of Ohio. Held, that it was an Ohio contract, and the liability of the maker must be determined by the laws of that state.

The place where the parties intend the note to become a subsisting obligation is the place of contract.

It was further held, that inasmuch as it appeared that the defendant had a separate estate, which was known to the payee and endorser of the note, the presumption is raised that the loan was made upon the credit of her estate, which, under the laws of Ohio, made her liable. Judgment given for plaintiff upon the verdict and motion for judgment non obstante veredicto refused.

No. 462 Third Term, 1907. Motion for judgment non-obstante veredicto.

Opinion by SWEARINGEN, P. J. Filed March 14, 1908.

This was an action brought by the Caroline S. Haseltine Land Company to recover from the defendant, Mary E. Whitney, the sum of \$4,000 with interest thereon from February 16, 1904, upon which, it was admitted, the defendant was entitled to a credit of \$16.25. The suit was brought upon a promissory note, a copy of which and also a copy of the endorsements thereon were attached to the statement of claim, in words and figures:

"\$4000.00. PITTSBURGH, PA., Aug. 16, 1900.

"Five years after date I promise to pay to the order of Louis B. Whitney, Four Thousand & 00-100 Dollars. Interest at 6 per cent per annum, payable quarterly, without defalcation, for value received.

"(Signed) MARY E. WHITNEY.

"Eighty (80) shares of Keystone Car Wheel Co. as collateral attached.

"Endorsed order of Caroline Haseltine.

"(Signed) LOUIS B. WHITNEY.

"YOUNGSTOWN, O., Sept. 1, 1906.

"Pay to the order of Caroline S. Haseltine Land Company.

"(Signed) EDWIN D. HASELTINE,  
"Sole Surviving Executor of the  
Estate of Caroline S. Haseltine."

Mrs. Caroline S. Haseltine was an old lady who resided at Youngstown, Ohio. She had not been away from her home for several years prior to the making of the note in suit. She was an aunt of Mary E. Whitney, the defendant. The latter is, and was on August 16, 1900, the wife of Louis B. Whitney, the payee of the note in suit. They resided in Pittsburgh, Pennsylvania. The families appear to have been intimate. Louis B. Whitney was the treasurer of the Keystone Car Wheel Company. It seems that the Whitneys desired to purchase some additional stock of said corporation and that there was some arrangement made, whereby the money for that purpose was to be obtained from Mrs. Caroline S. Haseltine. Louis B. Whitney testified that the money "was borrowed so we could procure eighty shares of the stock of the Keystone Car Wheel Company, of which I was one of the officers."

According to Mr. Whitney's testimony, he drew the note in suit and sent it to the defendant, who was then in Europe. She signed the note there and returned it to Mr. Whitney. He, as treasurer of the Keystone Car Wheel Company, then took a certificate for 80 shares of stock of said corporation, which was made out in his own name, and also the said note to Youngstown, Ohio, where he endorsed the latter to the use of Caroline S. Haseltine, attached the said certificate as collateral and delivered the note and collateral to Mrs. Haseltine in Youngstown, Ohio; and then and there he received from her, or on her account, a check for \$4,000. This check Mr. Whitney brought back with him to Pittsburgh and deposited in the treasury of the Keystone Car Wheel Company; and the check was collected by said corporation. The money did not go to Mary E. Whitney, the defendant.

Mrs. Caroline S. Haseltine died on March 26, 1904, testate. Subsequently, The Caroline S. Haseltine Land Co., a corporation, was formed, and the note in suit was assigned to the last named corporation by the surviving executor of Mrs. Haseltine's will. The jury has found that an arrangement



was made, whereby said stock in the Keystone Car Wheel Company was exchanged for \$2,000 of the first mortgage bonds of the National Car Wheel Company. This stock was, upon notice to Louis B. Whitney and Mary E. Whitney, sold, as the collateral of said note, for \$16.25, and was purchased by the Haseltine estate; and then the exchange for the bonds was made, which took place on January 11, 1906. In the verdict, Mary E. Whitney, the defendant, has been given credit for the value of these bonds.

At the close of the testimony the jury was instructed that the contract was to be regarded as a contract under, and to be governed by, the laws of the state of Ohio. The jury was further instructed that, if no such arrangement relative to the stock, as alleged by the defendant, was made, the verdict should be for the amount of the note; but that, if there was such an arrangement, then the jury was to ascertain the value of the bonds and deduct that sum with interest thereon from the amount of the note. As before stated, the jury found that there was an arrangement relative to the bonds, as alleged by the defendant, and credit for the value of the bonds has been given in the verdict, which was in favor of the plaintiff. No exception has been taken by the plaintiff.

The defendant presented a point, requesting the court for binding instructions in favor of the defendant, which was refused. The defendant has made the proper motions for judgment *non obstante veredicto* and for the certification of the testimony.

The contention of the defendant is that this contract, the note in suit, was a Pennsylvania contract, and that the rights and liabilities of the parties thereto are to be determined by the laws of the state of Pennsylvania. Under the laws of Pennsylvania a married woman is not liable for a note, of which she is an accommodation maker. Mrs. Whitney, the defendant, was a married woman at the time the note in suit was given. She was an accommodation maker of this note. Therefore, there can be no recovery by the plaintiff against Mrs. Whitney, the defendant.

On the other hand, the plaintiff contends that this contract, the note in suit, was an Ohio contract, and that the rights and liabilities of the parties thereto are to be determined by the laws of the state of Ohio. Under the laws of Ohio, a married woman is liable for a note of which she is an accommodation maker. Therefore, the plain-

tiff can recover in this action against Mrs. Whitney, the defendant.

The defendant, however, does not admit that a married woman is liable generally, under the laws of Ohio, as an accommodation maker. The contention is that she is liable upon such a contract only under certain exceptional circumstances, and that the circumstances of the present case do not bring this defendant within the exceptions.

There are, therefore, two questions presented for solution:

First. Whether this contract, the note in suit, is a Pennsylvania or an Ohio contract.

Second. If the contract is an Ohio contract, is the defendant liable therefor under the laws of the state of Ohio.

Upon the first question, the argument of the defendant is this: the note in suit is dated at Pittsburgh, Pennsylvania; no place of payment is named in the note; consequently, it is payable at the place of its date: *Clark v. Searight*, 135 Pa. 173; *Parsons on Notes and Bills*, Vol. 2, page 333, etc. Therefore, a note dated and payable at Pittsburgh, Pennsylvania, as the note in suit is, is a Pennsylvania contract.

We were not convinced at the trial that the position taken by the defendant was correct. We preferred to leave the question as to the bonds to the jury, with the instructions as to the contract before noted, so that we might have the benefit of a full argument upon the motion which the defendant has made. The case has been argued most ably by counsel for both parties, and exhaustive briefs have been submitted. After examination and upon further consideration, we are not convinced that any error was committed at the trial. We think the law is with the plaintiff; the equities certainly are.

Granting the presumption that the note in suit was payable at the place of its date, to wit, Pittsburgh, Pa., because no place of payment was named, it does not necessarily follow it was a Pennsylvania contract. The manual act of signing a note does not make it a contract. Nor does the dating of a note make it a contract. The place where a note is signed or endorsed is not necessarily, in contemplation of law, the place where the contract is made. The place where the parties intend that it shall become a subsisting obligation may, in law, be said to be the place where the contract is made. The intentions of the parties govern. *Baum v. Birchall*, 150 Pa. 164; *Mills v. Wilson*, 88 Pa. 118.

If the loan, evidenced by the note in suit, had been made in Pittsburgh and a note of this character given therefor, the above conclusion of the defendant would probably be correct. But, this was no such a contract. According to the defendant's own contention, Mary E. Whitney was but an accommodation maker. Therefore, as between the maker and the payee, there was no liability on the part of Mrs. Whitney, even though she had been under no disability. Not until this note was endorsed by the payee and delivered to the purchaser for value did it become a valid contract. When Louis B. Whitney endorsed this note and delivered it to Mrs. Caroline S. Haseltine and she paid him the money for it, then, and then only, did it become a binding obligation. Confessedly, the endorsement, delivery and discounting of the note in suit all took place in Youngstown, in the state of Ohio. Mrs. Haseltine there paid her money and received the securities, and the transaction was then complete. It seems to us that the place where this contract was made was Youngstown, Ohio.

"So, where a note is endorsed for accommodation in one state, and delivered in another, the endorsement is governed by the laws of the latter, for the accommodation endorser makes that party to whom he lends his signature, his agent for putting the instrument into circulation, and his own contract with those to whom it is negotiated must, consequently, be judged on the principles of agency, which refer it to the place where the circulation commences." *Daniel on Negotiable Instruments*, Fifth Edition, Vol. 1, section 868, page 888.

When Mrs. Whitney signed this note she made the payee her agent to put the note in circulation, and the contract was, therefore, referable to the place where the circulation commenced, which was at Youngstown, Ohio. This was the place where the note commenced to be a valid contract. At no other place was a contract actually made. This case is altogether different from that of a note already a binding contract in Pittsburgh, subsequently taken by the owner to Youngstown, and there discounted.

In *Bell v. Packard*, a married woman signed a note in Massachusetts as surety for her husband. Under the laws of Massachusetts she was not liable on such a contract. The note was delivered in Maine, where a married woman would have been liable upon such a contract. The Supreme

Court of Maine said:

"Upon these facts the principal question for determination is, where was the note in suit made or to be paid. For although the personal incompetency of the defendant to contract as surety for her husband in Massachusetts will, so far as all such contracts made there are concerned, follow her everywhere, still it will not be regarded as to such contracts made or to be performed here, where no such disqualification is acknowledged.

"Our opinion is that the note was made and intended by the parties to be paid in Skowhegan. For although it was signed in Cambridge, it was delivered to the payee in Skowhegan; and it was not a complete contract until delivered. This proposition needs no citation of authority, still we cite *Lawrence v. Bassett*, 5th Allen 140, as precisely in point.

"But even if this were not conclusive, we should have no hesitation in deciding that the construction and legal effect of the note declared on must be determined by the laws of this state, on the ground that no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law, and which it was competent for the parties to adopt. See *Story on Conflict of Laws*, Sec. 305-a."

*Bell v. Packard*, 69 Maine 105.

To the same effect are *Stanford v. Pruitt*, 27 Ga. 243; *Cook v. Moffat*, 5 Howard U. S. 307; *Gay v. Rainey*, 89 Ill. 221.

Although a married woman's accommodation note cannot be enforced against her, where signed, yet if it be endorsed and discounted in a state, where she is liable upon such a contract, payment can there be enforced. *Baum v. Birchall*, *supra*; *Evans v. Cleary*, 125 Pa. 204.

Such a note does not become a contract until it is endorsed and delivered. *Bowery National Bank v. Sniffen*, 61 Sup. Ct. Reports N. Y. (54 Hun.), page 394.

It seems clear, therefore, that this contract, the note in suit, was "made" at Youngstown, Ohio, and, as was said by our Supreme Court, quoting from a decision in Massachusetts:

"The authorities both from the civil and the common law concur in fixing the rule that the nature, validity and construction of contracts are to be determined by the law of the place where the contract is made." *Brooks v. R. R.*, 108 Pa. 529.

There seems to be a distinction between the place where a contract is "made" and the place where it is to be "performed."

"It would seem from the authorities, that a contract may have two different places, the law of which enters into its construction. If it be expressly payable, or to be otherwise performed, where it is signed, then that is the only place. If it be but a naked promise, without a special condition as to the place of payment, then it must be demanded of the maker where he is, or at his domicile, but it must be regarded as made where it was signed." *Parsons on Contracts*, Vol. 2, page 583.

If then the note in suit is presumed, because no place of payment is named, to be payable at the place of its date, to wit, Pittsburgh, Pennsylvania, as the defendant contends, this does not make it a Pennsylvania contract. *Hart v. Wills*, 52 Iowa, page 56.

It seems to us, therefore, that this contract, the note in suit, is an Ohio contract. And, this opinion is strengthened if, as appears to be the fact, the defendant contemplated and knew that the note was to be delivered and the transaction consummated at Youngstown, Ohio.

The remaining question is this: Assuming that this is an Ohio contract, is Mary E. Whitney liable under the laws of Ohio as an accommodation maker?

The statute of Ohio is in these words:

"The separate property of the wife shall be under her sole control, and shall not be taken by any process of law for debts of her husband, or be in any manner conveyed or encumbered by him, and she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried." Sec. 3109 Rev. St., Act of April 14, 1884.

"And a married woman may sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of, or against both her and her husband. Sec. 4996 Rev. St., Act of March 20, 1884.

"When a married woman sues or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to the heads of families." Sec. 5319 Rev. St., Act of March 20, 1884.

In the case of *Cord Fabrique Co. v. Stan-*

*age*, 50 Ohio, page 417, it was held, under the foregoing legislation, that a married woman is liable upon her contract in a personal action. See also, *Smith v. Frame*, 3 Ohio C.C. 587.

"Subsequently, in 1884, the laws of Ohio were amended, authorizing married women, during coverture, to contract to the same extent and in the same manner as if they were unmarried." *Ankeney v. Harmon*, 147 U. S. 124.

"Since the execution of the instrument, the powers of married women to enter into contracts, and the remedies thereon against them, have been materially enlarged. Under the law then in force, with a few exceptions, not important here, they were incapacitated by coverture to create a personal legal liability by contract, or bind their general estate, etc." *Stricken v. Schmidt*, 64 Ohio 357.

As before stated, the contention of the defendant is that, under the laws of Ohio, a married woman cannot contract generally, or as security for her husband, but only in reference to her separate estate. The defendant then argued that the making of the note in suit was not a doing business with reference to her separate estate. She also claims that the only property, which she has, is not liable for debts. (See the will of George S. Head, page 20 of the testimony.)

But, undoubtedly the defendant has a separate estate. Whether or not it can be seized in execution, upon a judgment entered against Mrs. Whitney, is a question which is not now before us. It is sufficient to determine the issues which are presented by this record.

But, the possession of a separate estate by Mrs. Whitney was known to Mrs. Haseltine, and it was also known that Louis B. Whitney had no estate. The presumption, therefore, is that the loan was made upon the credit of Mrs. Whitney's separate estate. No testimony has been offered to the contrary.

The motion for judgment *non obstante veredicto* is refused, and it is ordered that, upon payment of the verdict fee, judgment be entered for the plaintiff and against the defendant upon the verdict.

To the foregoing ruling the defendant excepts, and, at her instance, a bill is sealed. For plaintiff, *Williams & Edwards*.

For defendant, *White, Childs & Scott*.

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No. 44.

PITTSBURGH, PA., MAY 13, 1908.

## Orphans' Court, ALLEGHENY COUNTY.

In re Estate of ELEANOR A. VOWINCKEL, Deceased.

*Auditor—Statement of account of administrator.  
Practice—Interest—Surcharge.*

An account of an administrator stated by an auditor of the report made to the Orphans' Court, should be filed in the register's office, duly advertised and presented for confirmation to the Orphans' Court, and any exceptions filed to the report and account will be adjudicated upon its audit.

The costs incident to stating the account, including auditor's fee and fees of counsel, appearing for next of kin before the auditor, will be charged against the administrator.

An administrator will be charged with interest on trust funds from the time he received them, if he appropriated them to his own use and it does not appear when such appropriation was made.

No. 35 January Term, 1908. Audit of administrator's account.

Opinion by OVER, J. Filed February 4, 1908.

Eleanor A. Vowinckel died intestate July 2, 1904, leaving to survive her her husband, G. F. Vowinckle, Jr., and a minor child, of whom the Citizens Trust Company of Clarion is guardian. The husband was appointed administrator of her estate, and having failed to file an account after being cited to do so, Emmett E. Cotton, Esq., was appointed auditor by this court to state it, filed his report, and the account as stated by him on November 14, 1907, to which exceptions were filed by the administrator and guardian. The account was then directed to be filed in the register's office for the purpose of giving notice to creditors, and after being duly advertised was presented for confirmation to this court on January 6, 1908, and confirmed nisi. The exceptions filed to the auditor's report were then filed

to the account, and it came on to be heard upon the audit list, upon the exceptions filed and for distribution.

In stating the account the auditor charges the administrator with the amount of the inventory filed by him August 23, 1904, amounting to \$14,924.42, then with items not included in the inventory consisting of household furniture belonging to the decedent and moneys received by him from various sources, and interest, making total charges of \$22,571.74.

The administrator was credited in his bank account with \$144.88, deposited in June, 1906, with which the guardian claims the accountant should be charged in addition to the charges made against him by the auditor. The auditor refused to charge him with this item because "there is no evidence before the auditor that this money is not a part of the moneys already charged against him in this report, nor does it appear from what other source the said sum could have been derived." As the charges against the accountant are not based upon his bank account, but upon the inventory filed by him, and assets of the estate which the auditor found were not included in the inventory, unless it appears that the fund deposited was realized from assets with which he has not been charged, the auditor was right in his conclusions. It appears from the administrator's bank account that when the deposit was made his account was overdrawn to that amount, and the purpose in making it no doubt was to make good this overdraft, and this rebuts any inference arising from the facts of the case that the sum deposited was the proceeds of assets of the estate with which he has not been charged in the account. The exception as to this item is therefore dismissed.

The auditor has charged the administrator with six per cent interest on all moneys received by him from the date of its receipt, and also upon such sums as he might have reduced to his possession from the time he might have collected the same, to which exceptions are filed by the administrator. He opened an account as administrator in the Equitable Trust Company, the total deposits, with some interest allowed thereon, amounting to \$14,248.44, and checked out prior to

April 13, 1906, when the account was transferred to the Guarantee Title & Trust Company, all but \$233.44 of said amount. After the transfer he made deposits in the Guarantee Title & Trust Company, which, with the balance transferred, amounted to \$2,385.88, checking all out but \$6.88 by December 14, 1906. All of the moneys he checked out except \$4,500 paid to the guardian he appropriated to his own use. Under the 17th section of the act of March 29, 1832, P. L. 190, the accountant is only liable for interest prior to the time his account ought to have been settled on the funds of the estate which he has used for his own purpose. If he had deposited all the moneys realized from the estate in bank it could be determined from his bank account when he appropriated the moneys of the estate to his own use and interest would be computed on the different amounts from the date of appropriation. He did not, however, nor has any data been furnished by him from which it can be ascertained when the appropriation was made. He has treated the estate as if it was his individual property, not kept proper books, failed to account when required so to do, and if the charges of interest against him be excessive, it is due to his own gross negligence. The auditor has computed the interest to October 26, 1907, and if it is now to be computed on a different basis it would be to the date of the decree of distribution. We think that any advantage the administrator would derive in fixing a later period for beginning the computation would likely be overcome by computing the interest to a later period and that substantial justice will be done by dismissing the exception. As he is charged with interest on the whole estate in distribution he will be entitled to credit for the amount paid the guardian, with interest from the date of payments to October 26, 1907.

The value fixed by the auditor for the piano and household furniture in the second to the tenth items inclusive of the account seem to be too high and is reduced by fifteen per cent; and with this exception the account as stated by him is confirmed.

As the costs incident to the stating of this account, including the fee of the guardian's

counsel, were incurred by reason of the administrator's gross neglect to file an account, he must be charged with them, in addition to the amounts charged in the account.

The grandfather of the minor, who is living with him in Clarion county, presented a petition at the audit praying that the piano and household furniture be distributed in kind to the guardian for the use of the ward, to which the guardian objected. The guardian was appointed by the Orphans' Court of Clarion county where the minor resides; that court has exclusive jurisdiction of the minor's estate and of the guardian, and therefore this court has no jurisdiction of the matter, and application should be made to that court, and if it makes such an order the administrator can be allowed credit hereafter for the value of such articles as the guardian may be directed by that court to take.

For accountant, *Stonecipher & Ralston.*

For guardian, *Watterson & Reid.*

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## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

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### TODD v. GERNERT et al.

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*Mechanics' lien—Act of June 4, 1901—Notice of intention to file—Necessary words—Material and labor for several buildings and how apportioned.*

To a mechanics' lien was attached the following notice of an intention to file a lien: "That the undersigned as sub-contractors for the brickwork therein, under written contract thereto of date August 15, 1906, with John E. McClelland, furnished labor, material and workmanship about your dwelling house buildings . . . the total contract price therefor is \$3,079." On a rule to show cause why the lien should not be stricken off it was held, that whether the form and substance of the notice are in compliance with the provisions of section 8 of the mechanics' lien law of 1901, which relates to the duty of a sub-contractor to give notice of his intention to file a lien, are matters to be determined at the trial.

A single claim of a sub-contractor for brickwork was filed against three buildings, and the claim stated it was filed as "a whole and apportioned on said respective buildings." In the notice of an intention to file, the material and labor was apportioned indicating that the work done and material furnished each building could have been specified. Held, that under the law of 1901 the

amount of a single contract may be apportioned, but separate liens must be filed where the work performed has been upon independent structures. Rule to strike off the lien made absolute.

M. L. 24 December Term, 1907. Rule to show cause why lien should not be stricken from the record.

Opinion by Ford, J. Filed May 2, 1908.

The claim in this case was filed November 8, 1907, notice of intention to file lien given the owner August 22, 1907, a copy of the notice being attached to and made part of the claim.

The claim is for a balance of twenty-three hundred ninety-eight (\$2,398) dollars, with interest from June 1, 1907, due by the general contractor to the claimant under a written contract between the claimant and general contractor, and includes extra work and extra materials amounting to three hundred nineteen (\$319) dollars.

The claim is a single claim filed against three buildings, the contract being an entire contract for the brickwork necessary in the construction of the buildings.

The first of the reasons assigned for striking off the lien relates to defects alleged in the notice.

It is provided in clause eleven of section eleven of the act of June 4, 1901, that the statement of claim must set out "when and how notice was given to the owner of an intention to file a claim."

A copy of the notice need not be set out in the lien. Whether the form and substance of the notice are in compliance with section eight are matters to be determined at the trial. *Thirsk v. Evans*, 211 Pa. 239.

The claimant has met the requirements of the act by an averment of when and how the notice was filed, adding "a duplicate of which notice within embodied exhibit is hereto attached and made part hereof." Exhibit "A" being a copy of the notice averred to have been served by claimant on the owner.

It is not necessary to attach a copy of the notice to the lien, but when attached and made part of the record, is a proper subject of objection.

In *Collier v. Pennsylvania Railroad*, 29 Supr. Ct. 547, on objections to the notice of intention to file a lien attached to and made part of the lien, the lien was stricken off.

In *Wolf Company v. Pennsylvania Railroad*, 29 Supr. Ct. 439, a like question was raised.

Porter, J.: "The allegation of notice to the owner was in this case essential to the validity of the claims, and if it appeared on the face of the record, then the notice given failed to meet the requirements of the section . . . the lien was properly stricken off."

The notice attached to the lien sets forth: "That the undersigned as sub-contractors for the brickwork therein, under written contract thereto of date August 15, 1906, with John E. McClelland, furnished labor, material and workmanship . . . about your dwelling house buildings, . . . the total contract price therefor was (is) \$3,079."

The objection being that the notice does not attach a copy nor set forth the substance of the contract.

It will be noted that the notice informs the owner that the work was furnished under a written contract for the brickwork therein and the contract price.

*Collins v. Pennsylvania Railroad*, *supra*, the notice averred the furnishing of lumber under a verbal contract.

Porter, J. "The legislature has made the right of a sub-contractor intending to file a claim dependent upon his giving the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, etc. The vital elements of the contract are the covenants which it contains and a statement which does not furnish the owner with information of the substantial covenants of the contract does not meet the requirements of the statute."

The object of the notice . . . is to inform the owner of the demand and nature thereof, in order that he may protect himself in the manner provided in the act.

The notice informs the owner that the work was done and materials furnished under a written contract for the brickwork and the contract price.

The averment is not as specific as it could have been made, but we think the fair interpretation of the language is that the sub-contractor agreed to furnish the labor and materials for the brickwork in the buildings for the sum of \$3,079.

A substantial compliance with the act of June 4, 1901, is sufficient, and this is shown to exist whenever enough appears on the face of the statement to point to successful inquiry. *Amer. Car & Foundry Co. v. Alexander Water Co.*, 215 Pa. 520.

It is only in a clear case of insufficiency of notice that the court will strike off the lien. If the specifications are essential to set forth the contract the claimant may be permitted to show why a copy was not attached to his sworn statement. Whether the form and substance of the notice are in compliance with the provisions of section eight are matters to be determined at the trial.

The defendant also objects to the claim because

"That claimant has filed a claim for his whole amount against more than one structure or improvement, which structure or improvements are not intended to form part of one plant, being three separate and distinct dwelling houses, and . . . that claimant has filed an apportioned claim and that the same is contrary to section 12 of said act."

Section 12 of the act of June 4, 1901, P. L. 431, provides:

"A single claim may be filed against more than one structure or improvement, if they are all intended to form part of one plant. No apportioned claims of the amount due shall be allowed, but separate claims of the amount due determined by apportionment may be filed as hereinbefore set forth."

The claim is filed for work done and materials furnished for and about the erection and construction of certain buildings, erected on a certain lot or piece of ground in the Nineteenth ward, Pittsburgh. Said buildings being three brick dwelling houses, two being of two-story, etc., respectively Nos. 5502 and 5506 Black street, the other or middle one being three stories and No. 5504 Black street, and erected on above mentioned lot.

The claim is not against a block of three houses, nor against a building, tho of separate numbers, is a single structure, but is against "certain buildings, being three brick dwelling houses."

There is no averment that the buildings form part of one plant, nor from the state-

ment can it be fairly inferred that the buildings are dependent for use the one on the other, and may therefore be considered as one plant, and consequently as a unit which may be covered by one claim.

Plant is defined: The whole machinery and apparatus employed in carrying on a trade or business, sometimes including real estate and whatever represents investment of capital in means of carrying on a business . . . as the plant of a foundry, a mill or a railroad. Counsel for claimant contends that the word plant should be construed as undertaking—any business, work or project a person engages in or attempts to perform. The two words are not equivalent, one signifies the fixtures, tools, real estate, etc., by which a business is carried on, the other, a business or enterprise.

*Pennock v. Hoover*, 5 Rawl 298, held:

Kennedy, J. "I am inclined to believe that the intention of the legislature, when collected from the whole of the act of 1806 and its supplement of 1808 was to give the party who furnished the materials generally, for the construction of two or more houses belonging to the same owner without knowing how much of them was intended for each particular house or who performed labor in the construction of them under one entire contract generally, a joint lien on all the houses according to the full extent of the contract. Section 4 of the act of March 30, 1831, provided: 'It shall and may be lawful . . . for the person . . . providing materials . . . for two or more adjoining houses and other buildings built by the same person, owner of the same, and debtor for the said materials to file with his claim thereof an apportionment of the amount of the same among the said houses and other buildings . . .' The preamble of the act of 1831 clearly shows that the purpose of the act was to make it easy for the claimant, in those cases where it might be impossible for him to prove into what particular building each item of his claim went by allowing him to file a joint lien against all the houses, apportioning the total amount claimed among the different houses embraced in lien." *Mill Co. v. Greenawalt*, 11 Supr. Ct. 157.

The act of 1836, section 13, provided that in every case in which one claim for materials shall be filed . . . against two or more buildings owned by the same person . . . such joint claim shall at the same time designate the amount which he claims

to be due on each building.

As against the owner the claimant might apportion his claim and have a separate lien against each house or he may file a joint claim and in that case each house would be held for the whole amount. *Gorder v. Norton*, 186 Pa. 168.

The act of June 4, 1901, repeals all acts and parts of acts, general, special and local, appertaining to mechanics' liens, and it is provided by

Section 61: "It being intended that this act shall furnish a complete and exclusive system in itself as far as relates to liens for labor or materials commenced to be furnished after its approval."

Nothing in the act expressly preserves the right to file joint claims, and the question for consideration is whether the act of 1901 affects the right to file a single claim against two or more buildings erected on one lot under an entire contract.

Section 12 specifically provides that no apportioned claims shall be allowed and clearly indicates that one claim cannot be filed against more than one structure, unless they severally constitute parts of one plant, as in the case of a rolling-mill, where the boiler house, stock-room, engine-room, roll-house, etc., may be in separate buildings, or in the case of a series of apartments operated from a central power plant, and the like.

Single claims may, however, be filed under any number of separate contracts where the work has been continuous. The amount of a single contract may be apportioned, but separate liens must be filed where the work performed has been upon independent structures.

The nature of the work and not the character of the contract governs and determines the manner of lien.

Aside from the specific provisions of the 12th section the contents of a lien as required by the 11th section, as well as the definition of the terms embraced in the first section, would tend to confirm the same view.

If the contract be entire, for the erection of several dwelling houses upon one piece of ground—not comprising a plant—it is the duty of the claimant to apportion the amount due on each building and file separate claims. He is not required to specify the several items of labor or material supplied for and used in the construction of each house. The act contemplates that each house shall be subject to the payment of its apportioned share of the debt contracted. Any injustice

that may be done by the apportionment may be corrected by the jury on the trial of the *scire facias* under the court's direction. *Harper v. Keely*, 17 Pa. 234.

The claimant files his claim as "a whole and apportioned on said respective buildings," and in the notice of intention appertains the material and labor, indicating that he could have specified the work done and materials furnished in each building.

Rule absolute.

For plaintiff, *William A. Golden*.

For defendant, *A. H. Moeser*.

## Court of Common Pleas,

WASHINGTON COUNTY.

BEGGS v. BEGGS.

### Divorce—Maintenance—Non-support—Desertion

A, the wife of B, filed a bill in equity against B, praying that B be compelled to turn over to her certain moneys derived from the sale of real estate by the sheriff for her support and maintenance, alleging in the bill that her husband had deserted her and failed to support her for a period of more than five years, and had given a certain judgment note on which an execution was issued and real estate sold by the sheriff. The balance in the hands of the sheriff, after satisfying the liens, amounted to \$771.22.

Prayer of petition granted and sheriff directed to pay over the balance in his hands to A.

No. 1736 in Equity. Adjudication.

Opinion by TAYLOR, J. Filed April 22, 1908.

From the pleadings, admissions and relevant testimony taken in the case we find the facts to be as follows, to wit:

#### FACTS FOUND.

1. That Emma G. Beggs, plaintiff, is a resident of McDonald, Washington county, Pennsylvania, and is the lawful wife of W. A. Beggs, defendant; that the said parties were legally joined in marriage on the 11th day of May, 1881, and for many years prior to the desertion charged in said bill resided together in said borough of McDonald.

2. That the said W. A. Beggs, defendant, has not lived with the said Emma G. Beggs for a period of between four and five years prior to the date of the filing of this bill, and that the said W. A. Beggs has separated himself for that period of time from the plaintiff, his lawful wife, without reasonable cause, and because of his attachment for another woman not his lawful wife, and for



a period of more than one year last past has refused absolutely to provide anything for the support and maintenance of his lawful wife, Emma G. Beggs, the plaintiff, and that during the time aforesaid the said W. A. Beggs was of sufficient financial ability and was possessed of ample means to have provided sufficient in amount for the support of his said wife and due her in their station of life.

3. That for some time prior to the filing of said bill, the said W. A. Beggs, defendant, was, and still is, a resident of the city of Lima in the state of Ohio. That at the time of the filing of the said bill the said W. A. Beggs was the owner of a lot of ground situate on the corner of Fourth street and Washington avenue in the borough of McDonald, Washington county, Pennsylvania, said lot fronting seventy-five feet on Fourth street and extending back along Washington avenue in an easterly direction a distance of one hundred thirty-two and one-half feet to a twenty foot alley, upon which are erected a modern two story frame dwelling house of eight rooms, a bath room and a stable, all in good repair, encumbered with liens against the said property, and that on certain liens entered in the Court of Common Pleas of Washington county against said house and lot in the borough of McDonald, one of which is a judgment held by the First National Bank of Clintonville against W. A. Beggs, at No. 248 November Term, 1907, a fi. fa. was issued to No. 71 February Term, 1908, and upon which said Fi. Fa. the said house and lot in McDonald were levied upon and advertised at the public sale room in the court house on Saturday, February the 8th, 1908, at 1:30 p. m., and that when said sheriff's sale came on the said house and lot in the borough of McDonald were sold under the said fi. fa. to Mrs. Jennie M. Stilley of McDonald, at and for the price or sum of \$4,225. That on petition of the said Emma G. Beggs, plaintiff, setting forth the facts above referred to with reference to liens and sale of said property, the court of common pleas of said county on the 11th day of February, 1908, granted the prayer of the said Emma G. Beggs and ordered and directed the sheriff of Washington county to receive into his custody the purchase money for the said property, and after paying the amount of the liens and taxes against the said prop-

erty, to retain in his possession the remainder of the said purchase money until the further order of the court.

4. That there is now in the hands of John C. Murphy, high sheriff of said county, after paying the amount of the liens and taxes against the said property, a balance of \$771.22 applicable and to be applied by the said sheriff to the support and maintenance of the plaintiff as the wife of the defendant by reason of the desertion of the plaintiff by her said husband, for her support and maintenance.

5. That the said W. A. Beggs, defendant, was the part owner of oil leases situate in Venango county, Pennsylvania, which were being operated and on which there were a number of producing wells, but that the said W. A. Beggs some time prior to January 13, 1908, sold his entire interest for \$9,000. That the plaintiff has no separate estate.

#### CONCLUSIONS OF LAW.

First. That having found as a fact the marriage of the parties, the desertion of the plaintiff by the defendant, and his failure to support her as his wife, the plaintiff as such wife is entitled to have for her support and maintenance the balance shown to be now in the sheriff's hands and to have paid over to her for said purpose the said sum of \$771.22, being the balance which would be going to the defendant after the satisfaction of the lien upon which fi. fa. was issued and said real estate in McDonald sold, without prejudice to the wife, plaintiff, at any time in the future to proceed in law or equity to seizure and sale, or mortgage sufficient of such estate of the defendant in the future as will provide the necessary funds for such maintenance as the court may hereafter direct.

Second. That the plaintiff is entitled to the costs of this proceeding.

And now, April 22, 1908, it is ordered and directed that this adjudication be filed in the office of the prothonotary and notice of the said filing given by the prothonotary to the parties in interest, and if no exceptions are filed thereto within the time required by the equity rules a decree in accordance with this adjudication will be signed when drawn and presented by the successful party.

For plaintiff, *Irwin, Wylie & Morgan.*

For defendant, *T. F. Birch.*

[From Harry Russell Myers, Esq., Washington, Pa.]

# Pittsburgh Legal Journal

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No. 45.

PITTSBURGH, PA., MAY 20, 1908.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### FRANK v. ADAMS EXPRESS CO.

*Express companies—Loss of package—Limit of liability—Validity of.*

Plaintiff shipped a package by the defendant, an express company, at Pittsburgh, which was lost by the defendant in New York. The bill of lading stated "valued at \$— not given." It further stated that the rate was regulated by the value of the property and was based upon a valuation of not exceeding \$50.00 unless a greater value was declared. It also declared that "The company's charge is based upon the value of the property, which must be declared by the shipper," and further that the plaintiff agreed that the value was not greater than \$50.00 and the limit of liability was that amount. The plaintiff made no other declaration of value. On rule for judgment for want of sufficient affidavit of defense to a statement which alleged a greater loss it was held, that the law of New York, which holds such limitations of liability valid, should be applied and plaintiff could not have judgment for an amount greater than \$50.00. Whether the shipper knowingly and willfully, by false classification, obtained transportation for property at less than the regular rates, in violation of the Inter-State Commerce act, as alleged in the affidavit of the defense, was for the jury.

No. 599 December Term, 1907. Rule for judgment.

Opinion by MACFARLANE, J. Filed March 16, 1908.

When the plaintiff delivered the package to the defendant company at its office in Pittsburgh, Pa., the value was not asked and was not given and the bill of lading states, "valued at \$ — Not Given." The contract states that the rate is regulated by the value of the property and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared and the shipper agreed that the value was not more

than fifty dollars and that the limit of liability was that amount. On the upper margin is printed, "The Company's charge is based upon the value of the property, which must be declared by the shipper." It is averred in the affidavit of defense that the provisions of the contract were known to the plaintiff, also that a greater charge would have been made if the actual value had been disclosed and that the rate given was less than the regular rates then established.

The loss occurred in New York and was not explained, which raises a presumption of negligence: *Grogan v. The Express Co.*, 114 Pa. 523. In that case the shipment was to Springfield, Massachusetts, to which point it appears from the judge's charge the package was traced, and there it was lost, and it was held that the limitation of liability was not valid. No question was raised as to whether the law of Massachusetts governed nor as to what that law was and the rule of construction governing a contract made in Pennsylvania and to be performed here was applied.

In *Hughes v. The R. R.*, 202 Pa. 222, the contract limiting liability was made in New York, where it was valid, and the place of delivery was in Pennsylvania, where the injury happened, and it was held that the rule of this state applied upon the ground that the contract was for transportation through or into one or more other states and should be construed by the law of the state where its negligent breach causing injury occurred. Mr. Justice Potter in reviewing the cases refers to the case of *Forepaugh v. R. R.*, 128 Pa. 217, where the contract was made in New York and the injury occurred there, and although the suit was in Pennsylvania, the limitation was enforced. Applying this rule to the case at bar the decisions of the courts of New York that the limitation is valid are controlling.

For this reason the rule should be discharged, and we would express no opinion upon the other question raised, leaving it to be disposed of when the facts are developed upon the trial, but we are informed that counsel propose to take an appeal and therefore indicate our conclusions.

The Interstate Commerce Act (quoted in the affidavit of defense) declared that any

person who shall knowingly and wilfully by false classification or by any other device or means obtain transportation for property at less than the regular rates then established and in force shall be guilty of a fraud which is declared a misdemeanor. And it is immaterial whether it be with the connivance of the agent of the carrier or not. One who knows the terms of this contract understands that he is obtaining a rate upon the fifty dollar valuation, while the real value is greater, and may be guilty of knowingly and wilfully obtaining a reduced rate by not giving the correct value. It is not a question as between the parties to the suit. The plaintiff was not asked nor did he give a value, but the law applying to such a transaction, it being interstate commerce, declares it to be a misdemeanor to knowingly and wilfully declare a less value, to make false representation as to the contents or of weight or by any other device or means obtain a rate less than that established. The contract itself informs a shipper that this is what he is doing.

It is well established that a contract against the policy of the law or the provisions of a statute cannot be enforced. For these reasons this branch of the case is for a jury.

Judgment without costs may be entered for the amount admitted, \$50., with leave to proceed to trial for the balance if the plaintiff so desires, and upon application we will make the order.

For plaintiff, *S. Schein*.

For defendant, *C. F. Patterson*.

## Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

### SHIELD v. MARSHALL.

*Real estate—Agreement—Married woman—Accomplices—Specific performance.*

An agreement to sell real estate executed by a married woman, her husband joining but not acknowledged, is binding since the act of April 4, 1901.

An agreement to sell real estate which is described by the street, but without giving the municipality in which it is located, is good under the statute of frauds.

Equity will not enforce by specific performance a

valid agreement to sell real estate where it would be unjust and inequitable to defendant to do so.

No. 966 January Term, 1908. In Equity.

Opinion by OVER, J., specially presiding.  
Filed March 24, 1908.

The purpose of this bill is to procure a decree for the specific performance of a contract for the exchange of land.

#### FINDINGS OF FACT.

1. Ida Marshall, one of the defendants, being the owner of an improved lot in the Thirteenth ward, Pittsburgh, with her husband, Andrew Marshall, executed a written agreement (not acknowledged by her) with the plaintiff, a copy of which is attached to the bill, to convey to him the said lot subject to a mortgage of \$3,000, in consideration of which the plaintiff agreed to convey to her "All that certain property known as No. 317 Mead street, having erected thereon a two-story brick building subject to a \$3,000 first mortgage. Also all that certain property known as No. 319 Mead street, having erected thereon a two-story brick building subject to a \$3,500 first mortgage. The party of the second part agrees to execute a second mortgage of \$2,750 for one year in favor of the party of the first part on the Thirteenth ward property as above described." The defendants agreeing to pay the agent's commissions of \$200 out of rents.

2. Mead street is located partly in the city of Pittsburgh and partly in the adjoining borough of Wilkinsburg, the property being in the borough. Mrs. Marshall knew the location of the property and examined it prior to signing the agreement.

3. The defendants had placed their property with James T. Barr, a real estate agent, for sale; he opened negotiations with the plaintiff, conducted them alone between the parties and prepared the agreement.

4. The mortgages upon the Mead street property were due October 1, 1906, and the plaintiff having informed Barr that he could have them extended, Barr represented to the defendants prior to and when the agreement was executed by them that the mortgages would run three years from the previous interest bearing period. The plaintiff

has not procured an extension of the time of payment of these mortgages.

5. The plaintiff tendered a deed to Mrs. Marshall for the premises he agreed to convey to her and she declined to accept it, and defendants refuse to comply with the agreement.

#### DISCUSSION.

The question raised by the defendant that the agreement is not binding on Mrs. Marshall because she did not acknowledge it is settled by *Jenkins v. P. & C. R. R. Company*, 210 Pa. 134, where it is held that "Since the act of April 4, 1901, P. L. 67, a married woman may make a binding contract or option for the sale of her real estate by written agreement in which her husband joins without acknowledgement."

But another question as to the mutuality of the contract is not so clear. The only description given in the agreement of the property to be conveyed by the plaintiff is No. 317 and 319 Mead street, and as it does not appear in what city or borough Mead street is located, it is contended that the description is so defective that a decree of specific performance could not be made against the plaintiff if he refused to execute the contract, and that it is therefore voidable for want of mutuality. The decisions appear to be somewhat conflicting on this question; but as here the subject matter of the contract seems to be sufficiently described, parol evidence is admissible to apply the description to the land: *Fergus v. Staver*, 33 Pa. 411, and as there are some cases in which the description seems as defective as here where the agreements were held to be good, our conclusion is that the contract is valid and could be enforced against the plaintiff: *Sutter v. Isabella Furnace Company*, 210 Pa. 79; *Pearl v. Bryce*, 152 Pa. 277; *Smith & Fleek's Appeal*, 69 Pa. 474; *Troup v. Troup*, 87 Pa. 151.

But if Barr acted as the plaintiff's agent when he represented that the mortgages on the Mead street property would not be due for three years, there can be no question that a decree for specific performance should not be made. The plaintiff testified that he did not, and Barr, who was called as a witness by the plaintiff in answer to the question, "Were you at any time during these

negotiations agent for Mr. Shield?" replied "No, I don't think we were. We went for Mr. Shield's property in exchange for the Marshall property;" and also that he did not have any agreement with Mr. Shield's to pay a commission. Referring to the mortgages, in answer to the question if he had told the defendants they were overdue, he replied "No, we told them the mortgages would run three years from the previous interest bearing period or thereabouts. The idea was to have them extended which I believe we will do; we are ready to extend them I think." "Q. You knew they were overdue at that time? A. Yes, sir; but we had an arrangement to extend them, although it was not a matter of record." The defendants were not parties to any arrangements to extend the mortgages, did not know that such an extension was necessary, and the inference from Barr's testimony seems to be that he was acting with and for the plaintiff, had made arrangements to have them extended, and if so, in that respect, he acted as the plaintiff's agent, and made the representations to the defendants as such.

But even if he is not to be considered as the plaintiff's agent when he made these representations, we think the bill should be dismissed. They were made in the plaintiff's interest for the purpose of inducing the defendants to sign the agreement, and Barr failed to do his duty to them in not providing in the agreement for legal extension of the mortgages. There is nothing to prevent the owners of the mortgages from foreclosing them at any time, and if Mrs. Marshall is compelled to execute the agreement and cannot secure an extension of the mortgages, it is highly probable she would lose the property, and the transaction would thus be unjust and inequitable as to her.

In *Friend v. Lamb*, 152 Pa. 529, it was held that "A decree for specific performance is not a matter of course, but rests in the sound discretion of the chancellor. Even when the agreement is perfectly good, the price adequate and no blame attached to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied and the parties

turned over to their remedy in damages;" and that "In determining whether a decree for specific performance shall be made against a married woman, the court will consider her state and condition as being a married woman, even if the contract in question was within her power to make."

#### CONCLUSION OF LAW.

As Mrs. Ida Marshall, one of the defendants, a married woman, entered into the contract under a misapprehension as to the facts relating to the time of payment of the mortgages on the Mead street property, it would be inequitable and unjust to make a decree for specific performance of the contract against her, and the bill must be dismissed, one-half of the costs to be paid by plaintiff and one-half by defendant.

Let a decree be drawn accordingly.

For plaintiff, *Denis A. Behen*.

For defendant, *A. S. Miller and S. M. Myers*.

(Common Pleas No. 2, Allegheny Co.)

### TERHEYDEN v. DALLEY et al.

*Landlord and tenant—Subletting—Surrender of lease—Rights of sub-tenant—Equity—Decree pro confesso.*

A tenant having a lease which prohibited subletting, sublet a part of the premises to A, and afterwards assigned the lease to B. The landlord sued the original tenant for double rent, and the matter was fixed up between the landlord and B by B's surrendering the old lease and taking a new one at an increased rental.

Held the surrender of the lease did not destroy A's right to the premises, he having remained in possession and he thereby became a tenant directly under the landlord.

Where a decree in equity is entered *pro confesso* for want of an appearance the defendant cannot afterwards question the jurisdiction of the court.

No. 172 January Term, 1908. In Equity.

Opinion by OVER, J., specially presiding. Filed March 6, 1908.

The purpose of this bill is to procure an injunction against the defendants restraining them from interfering with the plaintiff's possession of certain premises occupied by him.

#### FINDINGS OF FACT.

1. Margaret Dallet, one of the defend-

ants, is the owner of a building, Nos. 2 and 4 Federal street, North Side, Pittsburgh, and in 1904, by written lease, demised the same to one, A. F. Harvey, who took possession under the lease for a term ending May 1, 1909, said lease containing the following clause:

"Lessee shall not use or occupy the said premises for any purpose whatsoever save as a hotel and restaurant; shall not sub-let the premises nor any part thereof, nor assign this lease nor any part of the term hereby created (this covenant against sub-letting and assigning being intended to apply as well to an involuntary transfer by operation of law, whether by execution, insolvency, bankruptcy or otherwise, as to a voluntary sub-letting or assignment.)"

C. C. Wager, another defendant, is her agent for the property.

2. The said Harvey on April 4, 1905, by written lease demised part of the premises, being a store-room, No. 4 Federal street, to one, A. M. Myers, for a term beginning May 1, 1905, and ending May 1, 1909, for the monthly rent of \$55, who went into possession of the room and established a barber shop therein which he operated until October, 5, 1905, when he sold the same and by writing on the lease assigned it to the plaintiff, who has since that time been in possession of the premises.

3. Leroy Cunningham, one of the defendants, was employed by Harvey August 1, 1906; as manager of the hotel, and continued as manager until about April 1, 1907, when Cunningham, having applied for a liquor license for the house, the lease from Mrs. Dallet to Harvey was assigned by him to Cunningham.

4. After Cunningham procured his license Wager, as agent for Mrs. Dallet, claimed that Harvey's lease was forfeited by reason of its assignment to Cunningham, and that by its terms Mrs. Dallet was entitled to twice as much rent as Harvey had paid, demanded it and brought an action against Harvey to collect it. After some negotiations between the parties Wager, acting as agent for Mrs. Dallet, the lease between her and Harvey was cancelled, it being delivered to him, and a new lease terminating May 1, 1909, made by Wager as Mrs. Dallet's agent

to Cunningham for the premises included in the Harvey lease at the rental of \$5,000 per annum, being an annual increase of \$1,000 above the rent in the Harvey lease.

5. When the Cunningham lease was made both he and Wager knew the barber shop was in the plaintiff's possession and that he claimed the right of possession as sub-tenant under the Harvey lease.

6. The plaintiff has tendered to Wager as agent for Mrs. Dallet, all the rent falling due on the lease under which he claims title, which was not accepted, and also made a tender thereof to Cunningham, and it was not accepted.

7. Cunningham has threatened to eject the plaintiff from the premises held by him unless he agrees to pay a rental of \$100 per month.

8. Wager, as agent for Mrs. Dallet, does not intend to interfere with the plaintiff's possession unless compelled to cancel the lease now in force with Cunningham.

#### DISCUSSION.

It is not necessary to consider whether under the clause in the lease from Mrs. Dallet to Harvey, quoted in the first finding of fact, the lease could have been forfeited because Harvey assigned it and also sub-let the premises, as whilst the agent asserted the right to forfeit the lease, he did not do so but claimed additional rent and brought an action to recover it. Any right to enforce a forfeiture of the Harvey lease was thus waived, and when the compromise was made by which that lease was surrendered and a new lease made to Cunningham, the plaintiff had the right of possession of the premises in dispute under the Harvey lease to Meyer, and as both the lessor and lessee knew then that the plaintiff was in possession and that he claimed under that lease, his rights could not be prejudiced by the surrender by Harvey of his lease from Mrs. Dallet. In *Hensel v. Johnston*, 129 Pa. 173, it was held,

First. That a tenant for a term certain who has sub-let the premises of a portion thereof, cannot by a surrender to his lessor prejudice the rights of the sub-tenant who will be held to have attorned to the original landlord on the terms of the sub-lease to him; and

Second. That if after such sub-letting and surrender the sub-tenant has remained in possession of the premises sub-let to him, his goods thereon are not liable to restraint for rent due from a new tenant to whom the landlord has demised the premises after the surrender.

It seems from this case that the plaintiff here holds possession directly under Mrs. Dallet, and should attorn to and pay the rent provided in the lease under which he holds to her.

The doubtful question is as to the plaintiff's right to an injunction. There does not seem to be any imminent danger of Mrs. Dallet or her agent interfering with his possession, or making levy upon his goods for excessive rent; if this should be done the injury would not be irreparable, there would be an adequate remedy at law, and as to them the bill must be dismissed.

Cunningham, however, is in a different position. Although duly served he entered no appearance, filed no answer, and a decree pro confesso was entered against him. The jurisdiction of the court and the plaintiff's right to an injunction is thus admitted by him; and even if he had subsequently entered an appearance, he would have no standing to raise the question of jurisdiction: *Smith v. Carter*, 219 Pa. 315.

In addition to this, if our conclusions be correct, his lease is subject to the right of possession by the plaintiff under the Harvey lease to Meyer; he has no right to collect rent from the plaintiff, nor to interfere with his possession in any way, yet he has threatened to eject him unless he pays an increased rental, and as this would be a wilful trespass it may be that even if the question of jurisdiction had been raised by him, that an injunction could be granted.

#### CONCLUSIONS OF LAW.

First. The plaintiff's possession of the premises, No. 4 Federal street, North Side, Pittsburgh, is not affected by the lease from Mrs. Dallet to Cunningham; but the plaintiff holds directly under her and should attorn to and pay the rent reserved in the lease from Harvey to Meyer to her.

Second. The bill must be dismissed as to Margaret Dallet and Charles C. Wager without costs to them.

Third. As a decree pro confesso has been entered against Leroy Cunningham, one of the defendants, an injunction as prayed for must issue against him.

For plaintiff, *Scandrett & Barnett*.

For defendants, *Lewis & Newmyer*.

### Book Notice.

**CORPORATION MANUAL, 1907-08. FIFTEENTH ANNUAL EDITION.** Edited by JOHN S. PARKER, Esq., of the New York Bar, assisted by the Corporation Manual editorial staff and associate editors in every state. CORPORATION MANUAL COMPANY, Publishers, New York City. Price, \$6.50.

This work contains the text of the corporation laws of every state with explanatory notes and decisions. The laws of each state are given separately under uniform headings, as follows:

1. Incorporation and Organization.
2. Corporate Existence and Franchise.
3. Corporate name, seal, domicile, by-laws and records.
4. Capital stock and dividends.
5. Members and Stockholders.
6. Officers and Agents.
7. Corporate powers and liabilities.
8. Insolvency and Receivers.
9. Reincorporation and Reorganization.
10. Consolidation.
11. Dissolution and Forfeiture of Franchise.
12. Foreign Corporations.
13. Taxation of Domestic and Foreign Corporations.

At the end of the volume there is an encyclopedia of corporate forms, embracing for every state certificates of incorporation, charters, object clauses, bonds, agreements, preferred stock clauses and acknowledgments by corporations. The book contains 1928 pages, and as a reference work is complete in every particular.

### Pennsylvania Bar Association.

The fourteenth annual meeting of the Pennsylvania Bar Association will be held at the Hotel Cape May, Cape May, New Jersey, on June 23, 24 and 25, 1908.

Robert Snodgrass, Esq., Harrisburg, will deliver the President's address on Tuesday.

The annual address will be delivered the same evening by Hon. Hannis Taylor, for-

merly minister to Spain, of Washington, D. C., on "Pelatiah Webster, the Architect of the Constitution."

Short papers, followed by a discussion of each paper, will be read as follows:

Hon. Reuben O. Moon, Philadelphia—"The Indeterminate Sentence, Parole and Adult Probation."

A. Leo Weil, Esq., Pittsburgh—"Modern Municipal Conditions and the Lawyers' Responsibility."

Hon. Harman Yerkes, Doylestown—"Some Observations of the Practice of the French Code."

Charles L. McKeehan, Esq., Philadelphia—"Testing Legislative Rate Regulations Under the Fourteenth Amendment."

The fourteenth annual banquet will be held at the Hotel Cape May on Thursday.

Reservation of rooms can be made by written application to John P. Doyle, manager, Hotel Cape May.

The Association requests the Judges of the counties whose court calendars conflict with this annual meeting of the Association kindly to suspend their rules and arrange their court business so as to permit the attendance of the members of the Association at this annual meeting.

WILLIAM H. STAAKE, Secretary.

In the case of *In re W. J. Floyd & Co.*, 19 Am. B. R. 438, it has been held that a partnership mortgage given within the four months period and while the partnership was insolvent, to secure the individual debt of a member of the firm, constitutes a voidable preference, upon the adjudication in bankruptcy of the partnership.

Where a debtor, knowing that he was insolvent and unable to pay his creditors in full, five days before his adjudication made a payment of money to the board of trustees of a township, who at the time knew of the insolvency of the debtor, and that said payment was intended to be preferential, it has been held, in *Painter v. Napoleon Township*, 19 Am. B. R. 412, that the trustee in bankruptcy may maintain an action against the said board of trustees to recover the payment.

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No. 46.

PITTSBURGH, PA., MAY 27, 1908.

## Court of Common Pleas, WASHINGTON COUNTY.

### WAYNESBURG & WASHINGTON R. R. CO. v. COUNTY OF WASH- INGTON.

*Railroads—Act April 5, 1907, P. L. 59—  
Constitution of Pennsylvania, article 16,  
section 10—Regulation of rates to be charged  
by railroads in Pennsylvania.*

At the instance of a railroad company, incorporated under the general railroad law of Pennsylvania, and its supplements, equity will restrain the enforcement of the act of April 5th, 1907, P. L. 59, known as the two-cent rate law, where it appears that the imposition of that rate of fare will render the operation of the railroad unremunerative and cause injustice to the corporators.

No. 1759, in Equity. Injunction bill.  
Adjudication.

Opinion PER CURIAM. Filed May 8, 1908.

#### FINDINGS OF FACT.

1. That the Waynesburg & Washington Railroad Company is a corporation of the State of Pennsylvania, incorporated on the 18th day of May, 1875, and was organized and exists under the terms and provisions of the act of assembly of the Commonwealth of Pennsylvania approved the 4th day of April, A. D. 1868, P. L. 62, entitled, "An act to authorize the formation and regulation of railroad corporations," and the supplements thereto, and particularly the supplement approved the 18th day of March, 1875, P. L. 28, entitled, "A supplement to an act to authorize the formation and regulation of railroad corporations, approved April 4, A. D. 1868." In and by the terms of the act referred to, the plaintiff became and is vested with all the powers conferred upon railroad companies of Pennsylvania by the

act of assembly approved the 19th day of February, 1849, P. L. 79, entitled, "An act regulating railroad companies," said act being commonly known as the "General Railroad Act of Pennsylvania."

2. The railroad operated by the plaintiff is what is known as a narrow gauge railroad, to wit, a railroad with a gauge of three feet, and is constructed through a hilly country upon a location and with grades and curvatures not practicable to be operated by a standard gauge railroad. Said railroad is approximately 29 miles in length, with its northern terminus in the borough of Washington, in the county of Washington, and its southern terminus in the borough of Waynesburg, in the county of Greene.

3. The plaintiff's line of railroad was opened for business in November, 1877, and since that time plaintiff has been engaged in exercising its corporate powers and duties as a carrier of freight and passengers through said counties of Washington and Greene. The section through which plaintiff's road passes between its termini is an agricultural district, and there is no town or village upon the line of said road between said termini, nor any mining or manufacturing operations.

4. In and by the terms of the acts of assembly which constitute a part of the plaintiff's charter, and particularly the 18th section of the General Railroad Act of 1849, it was provided that plaintiff might "from time to time establish, demand and receive such rates of toll, or other compensation, for the use of such road and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles containing the same, or otherwise passing over or on the said railroad, as to the president and directors shall seem reasonable;" with the proviso that "in the transportation of passengers no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

5. Prior to the passage of the act of the general assembly of the state of Pennsylvania entitled, "An act to regulate the maximum rate and minimum fare to be charged for transportation of passengers by railroad



companies, and prescribing the penalty for violation thereof," approved April 5, 1907, there were in force upon plaintiff's line of railroad certain rates for passenger service, established by the president and directors of the plaintiff company, which exceeded two cents per mile, ranging from 1.45 cents to 3.41 cents per mile, and averaging 2.91 cents per mile, and also certain rates for carrying freight.

6. The country through which plaintiff's road passes does not produce a very large traffic in either passengers or freight, the total earnings of the said road for the year 1906 (being the last calendar year prior to the passage of the act of 1907 hereinbefore referred to) from operation was \$147,496.55, of which the total revenue from freight traffic was \$64,001.16; from passenger traffic, \$73,467.26; from excess baggage, storage, milk, etc., \$3,366.38; from transportation of mail, \$3,484.93; from express traffic, \$2,977.66, and from demurrage, freight storage, etc., \$199.16.

7. Plaintiff's line of railroad is a valuable property, well constructed and well maintained. Plaintiff has invested over \$400,000 in the construction and equipment thereof. Plaintiff's capital stock amounts to \$200,550 at par, but there has been expended for additions and betterment out of the earnings of the property upwards of \$200,000 additional.

8. During the first twenty-one years of operation of the plaintiff's line of railroad, to wit, from the year 1877 to 1898, no dividends whatever were paid to the stockholders, all the profits for the said years being reinvested in the improvement of the property. The company began to pay dividends in the year 1898 at the rate of 5 per cent, which was paid annually down to the year 1903. During the years 1903 to 1905, inclusive, an annual dividend of six per cent was paid to its stockholders, and during the years 1905 and 1907 an annual dividend of eight per cent was paid. The net earnings for the year immediately preceding September 30, 1907, when the act of April 5, 1907, went into effect, out of which dividends might be declared was in round numbers \$37,000, and the reduction of the net income of the road for that year, had the rates for passen-

ger travel been two cents, would have been \$16,000.

9. The present value of the plaintiff's line of railroad is \$400,000.

10. The effect upon the plaintiff's business of the imposition of the rate of fare not exceeding two cents per mile for passengers is such as to reduce its entire earnings from operation (passengers, freight, mails, express, etc.) to such an amount as to be unremunerative and to cause injustice to the corporators of the plaintiff company by preventing it from earning a fair and adequate return upon the present actual value of its railroad.

11. The plaintiff's business is diversified—that of carrying passengers, freight, mail and express matter, but is so conducted as to be a single indivisible business in ascertaining whether or not it is profitable. It has but one track on its roadbed, one set of engines that interchangeably haul passenger and freight trains, one superintendent and one set of officers at its stations. No part of its capital has been invested specially to provide passenger transportation facilities as distinguished from its facilities to transport freight, and there is no way to so accurately ascertain its profits in carrying passengers and its profits in carrying freights as separate investments and separate businesses as to give sufficient basis for judicial action.

12. Since October 1, 1907, the plaintiff company has charged its passengers but two cents per mile and the reduction in the fare has not to any great extent increased the amount of travel.

#### CONCLUSIONS OF LAW.

First. That the act of April 5, 1907, No. 52 of laws of Pennsylvania, session of 1907, page 59, recited in the fifth paragraph of the plaintiff's bill, so changes the franchises which the plaintiff corporation possessed under its charter obtained from the Commonwealth, as set out in our first finding of fact, as to render the plaintiff's business so much less remunerative as to do injustice to the stockholders thereof, and is for this reason inoperative as to it.

Second. That the plaintiff is entitled to exemption from prosecution under the provisions of said act of Assembly and to an injunction against the defendant to restrain

it from bringing any suit against it for the recovery of the penalty imposed by said act so long as present conditions continue.

#### COMMENTS.

The rights of the corporators of the plaintiff company prior to the passage of the act of 1907 were "from time to time to establish, demand and receive such rates of toll, or other compensation, for the use of their road and their motive power, and for the conveyance of passenger, the transportation of merchandise and commodities, and the cars or other vehicles containing the same, or otherwise passing over on their railroad, as to the president and directors should seem reasonable, provided that in the transportation of passengers no charge should be made to exceed three cents per mile for through passengers and three and a half cents per mile for way passengers." With the act of 1907 in force as to them, their rights were exactly the same, except under the proviso they could in the transportation of passengers make no charge which would exceed two cents per mile. The tenth section of article 16 of our state constitution provides "that the General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or that may hereafter be created, when in their opinion it may be injurious to the citizens of this commonwealth; in such manner, however, that no injustice shall be done to the corporators."

The question for decision is, Does the change made in the rights of the corporators of the plaintiff company, by the act of 1907, violate the section of the constitution just quoted? The first thing to be observed is that this is necessarily a question of fact to be judicially ascertained. The right of the legislature to pass such a law being unquestioned, the presumption arises that the law (being general) is enforceable against the plaintiff corporation, and therefore the burden is on it to show that by reason of the constitutional provision it should in equity and good conscience be exempted from its operation. A chancellor will give it relief only upon its producing proof sufficient to move his conscience to stay the enforcement of the law against it, leaving it to be en-

forced against other corporations that may have a more remunerative business.

The language of the constitution is, "do no injustice to the corporators." What does this mean? Does it mean that no law can be passed that will reduce the income of the corporation? Clearly not. It means, as we view it, that the legislature can, in the interest of the public, prevent the corporation making charges that would give the corporators an unreasonably large income from the money they have invested, but that it cannot enact laws that will so change the income of a railroad corporation as to deprive the corporators of a fair and reasonable return upon their investment. Whether the law of 1907 should be enforced against the Waynesburg & Washington Railroad Company depends upon how such enforcement would affect the net income of the company out of which the corporators make their profits. Would it reduce their net income so that a fair, reasonable profit could not be paid to the corporators? What is a fair and reasonable profit is a complicated and difficult question to determine, but for the purpose of this case we hold that a six per cent annual dividend to the stockholders and a three per cent annual surplus fund to meet extraordinary expenses and to make betterments not to be capitalized, to be computed upon the original and subsequent investments made by the stockholders, or in other words the present actual value of their property, would be no more than a fair profit; and if the act of 1907 reduces their profit below this, it would do them an injustice in the sense in which that word is used in the 10th section of the 16th article of the constitution. The original investment of the stockholders was \$200,550, and for over twenty years the profits of the business amounting to about \$200,000 were invested in betterments or permanent improvements. This would make the total investment or the present value of the plaintiff's property \$400,000. A fair and reasonable profit on this investment, as we have found, would be \$36,000 per annum. The profits of the plaintiff company for the year preceding the time the act of 1907 went into force were in round numbers \$37,000. Putting the act of 1907 into operation, if the

passenger business would continue about the same, would decrease the annual net income about \$16,000, which would reduce the net profits from the operation of the road to \$21,000, a sum \$15,000 below what we have found would be a fair and reasonable profit to the corporators.

Let us now consider two contentions that were maintained at the hearing, which we hold can not in equity and good conscience be sustained—one by the plaintiff and one by the defendant.

The plaintiff contended that the profits of the passenger business of its road would be reduced to an unreasonably low margin by the enforcement against it of the Act of 1907, and claims that for this reason it ought in equity and good conscience to be relieved from obeying the mandates of the law, regardless of what its profits from its other business were. This claim cannot be allowed for two reasons. First, the evidence does not satisfactorily establish what would be a fair profit on the passenger business segregated from the other business of the road, nor is such proof in our opinion available in a case such as the one at bar. It is true, that an expert accountant can take the books of the company and figure out a division of the entire profits of the company for a year, so as to give the company's profits on passenger business, on freight business, on express business and on carrying the mail, but the business of the company as a whole is so interwoven in such an indivisible unit that such a division would be based upon arbitrary assumptions. But more than this, if the company is receiving a profit on its business as a whole, so large that the public acting through the legislature could in good conscience under the constitution reduce it, the company is in no position to complain that the legislature in making the reduction has favored the traveling public rather than the shipping public. If the company holds on to the more than reasonable profits of its freight, mail and express business, has it standing in a court of equity to complain of the reduction of the profits of its passenger business if that reduction still leaves it a reasonable profit on its whole business? While the expert accountant figures down the

profits of the passenger business in a case of this kind, he necessarily figures up the profits of the other business. Therefore in a case where the profits of the business as a whole are unreasonably high and could be constitutionally reduced in the interest of the public, it would be impossible for the plaintiff to complain that its profits were reduced below what was fair and reasonable in its passenger business without at the same time admitting that it was getting unreasonably high profits in its other business. Would this be coming into court with clean hands? Would this be the kind of a complaint that would appeal to the conscience of a chancellor? We think not.

Now, as to the defendant's contention. We agree with the defendant's counsel that the manner in which the profits of the passenger business are figured out by the expert accountant examined at the trial is subject to just criticism, and that the calculation contained in his brief is more equitable; yet the defendant forgets that the corporators are entitled to a dividend not only on the face value of the stock but on what has been put into the road to make permanent improvements in addition to the amount of the capital stock which was expended in the original construction of the road. In other words, \$400,000 and not \$200,550 must be taken as the corporators' investment in calculating what would be a fair return to them.

And now, May 8th, 1908, it is ordered that the foregoing adjudication be filed in the Prothonotary's office and notice thereof be given to the attorneys of record, and if no exceptions are filed thereto that a final decree be prepared in accordance therewith.

For plaintiff, *George B. Gordon and Irwin, Wiley & Morgan.*

For defendant, *James I. Brownson.*

(From Harry Russell Myers, Esq., Washington, Pa.)

It has been held, *In re Baumblatt*, 19 Am. B. R. 500, that a bookkeeper employed by a bankrupt at a regular salary payable monthly, his services being of a continuous nature and such as might extend for years to come to the business of the bankrupt is a "clerk" within the meaning of section 64b (4) of Bankruptcy Act, and is entitled to priority of payment for salary earned within the three months period.

**Court of Common Pleas No. 3,**  
**ALLEGHENY COUNTY.**

**VOEGTLY v. THE MERCANTILE**  
**TRUST CO., Assignee, Etc.**

*Equity—Real estate—Blanket mortgage—Release of lien—Marshalling assets.*

Where the holder of an incumbrance upon various pieces of real estate releases the piece last sold, this will, if the pieces released are of sufficient value to pay the debt, operate to discharge the lien of the incumbrance on the pieces previously sold. Where it is not shown that the lots released are of sufficient value to pay the debt, but it had been the custom of the mortgagee to release each lot on the payment of a fixed amount, equity will decree a release of the lien upon tender by the owner of the lot to the mortgagee of the customary amount.

No. 490, November Term, 1906. In Equity.

Opinion by MILLER, J., specially presiding. Filed March 26, 1908.

The bill in effect prays for a decree directing the defendant, assignee for the benefit of creditors, to release the lien of a blanket mortgage from plaintiff's lots, upon payment of a certain amount on each of said mortgaged lots.

From the pleadings and evidence the following material facts are found:

**FINDINGS OF FACT.**

First. The plaintiff in 1902, by deed dated December 2nd, duly recorded, purchased three lots, Nos. 8, 9 and 10, in Dean's Second Plan of Lots in the Fourteenth ward, Pittsburgh; each of said lots was improved with a brick dwelling house, and each lot subject to a three thousand dollar first mortgage; the whole consideration as expressed in the deed was \$14,500; these lots, including about 122 other lots, in the foregoing and other plans, and also a power house plant, were subject to a second mortgage of \$40,000, given by the United Realty & Construction Company to the Prudential Trust Company. Said deed and mortgages were duly recorded.

Second. The Prudential Trust Company mortgagee established, and followed the custom of releasing the lien of said \$40,000

mortgage from a large number of said 125 lots, all of which are about of equal value, with similar improvements thereon, upon payment of from \$150 to \$200 per lot, and so continued until it made a voluntary assignment to the defendant for the benefit of creditors on June 21st, 1904, at which time all the lots save five, the plaintiff's three being a part thereof, were released, and at which time the balance of the debt remaining unpaid on said blanket mortgage was about \$6,200.

Third. Subsequent to the date of plaintiff's deed, to wit: December 2nd, 1902, the United Realty & Construction Company sold ten lots covered by said mortgage in said plans, and the Prudential Trust Company released from the lien of its said mortgage eight of the lots so subsequently sold in said plan, and also released in addition nine other lots in other plans covered by said mortgage. The value of the lots so sold and released is not given, nor does the value of the equity which the Prudential Trust Company had in the released lots appear.

Fourth. The plaintiff is willing to pay two hundred dollars for the release of each of said lots.

**CONCLUSION OF LAW.**

The subsequent sale and release from the lien of the \$40,000 mortgage, of the other lots, by operation of law, released the lots previously sold to the plaintiff, assuming that the lots released were of sufficient value to pay the balance of the mortgage debt. If this had been definitely shown as a fact, plaintiff would have been entitled to the release of his lots without the payment of any additional money. But as it has not been definitely shown, and as the custom was to release upon payment of \$150 to \$200 per lot, which latter sum the plaintiff has offered to pay, and as he is entitled to equitable relief from the apparent burden of the whole balance of this mortgage debt upon his property, a decree will be entered directing the defendant company, assignee, upon payment by plaintiff to it of six hundred dollars, and the costs of this proceeding, to release of record plaintiff's lots as described in the bill.

**OPINION.**

It is manifest that the mere custom of the

Prudential Trust Company to release lots of similar value upon payment of a fixed consideration would not of itself afford the plaintiff relief, however strong his equity appears. Neither in his deed, nor in the mortgage, appears any stipulation or agreement of release; nor was any effort made to show an outside parol or written agreement to that effect.

But when the Prudential Trust Company, mortgagee, after the date of Voegtly's deed, released lots sold subsequently to the sale to him, its release so made shifted the lien from the prior lots sold also, and fastened it on those of a later date. Pieces of land subject to a common encumbrance, when sold successively by the owner are liable for the encumbrance in the inverse order of alienation; *Martin's Appeal*, 97 Pa. 85; consequently if the holder of the encumbrance releases the piece last sold this will, if the pieces released are of sufficient value to pay the debt, operate to discharge the lien of the encumbrance on the parts previously sold; *Turner v. Flenniken*, 164 Pa. 469.

It is urged, that this applies only in case the mortgagee had notice of such subsequent sales. The answer is, that it had constructive, if not actual notice of such sales. When it, of record, released in favor of subsequent purchasers it knew that its mortgagor had these lots for sale, that such was the purpose for improving the property, and it was bound to know from the large number of releases executed by it that the premises released had been sold.

At best, failure of notice would only subject the plaintiff to liability for any unpaid purchase money; *Prafsinger v. Hutchison*, 24 P. L. J. 50, and of this there is no evidence; nor is the question of notice raised by the answer, *Martin's Appeal*, *supra*, and therefore even if material, has no application here.

For plaintiff, *J. McF. Carpenter and Ed. G. Hartje*.

For defendant, *Stone & Stone*.

A statute regulating the sale of stocks of goods in bulk is held, in *Compton v. Dietlein* (La.) 12 L.R.A.(N.S.) 174, to have no application to a transfer in payment of a creditor.

### Book Notice.

ON THE WITNESS STAND. Essays on Psychology and Crime by HUGO MUNSTERBERG, Professor of Psychology at Harvard University. THE MCCLURE COMPANY, New York; Publishers, 1908. Price, \$1.50.

This is a work by an eminent authority on psychology. From the title it might be supposed that it was a practical work on the examination of witnesses in court. Its only object, however, is an attempt to deal with problems where psychology and law come in contact. As the author says, he does not attempt to touch on the psychology of the attorney, the court or the jury, doubtless subjects of much interesting experimental treatment. The work treats in a scientific and psychological way of illusions, the memory of witnesses, the detection of crime by the association of ideas, the traces of the emotions, untrue confessions and their causes, hypnotism and crime, and lastly, the prevention of crime. Under the method of administering criminal law in this country, it cannot be said to be a practical work. However interesting and perhaps successful the method of detecting crime may be, it could not be used in any court without destroying that protection which our law has vouchsafed the accused. The book is instructive and very interesting, because it treats of a subject that has not been studied scientifically until recent years.

A statute providing that actions for wrongs done to the property rights or interests of another shall survive the death of the wrongdoer is held, in *Bates v. Sylvester* (Mo.) 11 L.R.A.(N.S.) 1157, not to include a widow's claim for negligent killing of her husband.

The satisfaction of a debt on receipt of 30 per cent of its amount is held, in *Melroy v. Kemmerer* (Pa.) 11 L.R.A.(N.S.) 1018, to be supported by a sufficient consideration, where the debtor contemplated bankruptcy, and the creditor dissuaded him therefrom and accepted his offer of 30 per cent in satisfaction of the debt, received the amount, and closed the account.

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No. 47.

PITTSBURGH, PA., JUNE 3, 1908.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

**RIDDLE, Receiver of Amyville Yough-  
iogheny Gas, Coal & Coke Co. v. EL-  
DER, doing business as the Blythe-  
Elder Coal Co.**

*Receiver—Illegal preference—Rule for judg-  
ment.*

In an action by the Receiver of a coal company, for coal shipped by him (as receiver) to the defendant, the defendant by way of defense alleged that prior to the Receiver's appointment he had loaned the company \$5,300; and, having given the company an order for 5,000 tons of coal, it was agreed between himself and the company's president, that the coal to be shipped on said order should constitute a proportional payment of of said loan. Held, that the attempt by the defendant and the receiver to carry out said agreement was unlawful, and that judgment should be entered for the plaintiff.

No 400, March Term, 1908. Rule for judgment.

Opinion by BROWN, P. J. Filed May 9, 1908.

### STATEMENT OF FACTS.

1. This rule for judgment, for want of a sufficient affidavit of defense, arises in an action to recover \$3,252.66 for coal shipped by plaintiff to defendant in August, September, October and November, 1906.

2. The receiver was appointed July 28th, 1906.

3. Prior to the receiver's appointment defendant loaned the Amyville Youghiogheny Gas, Coal & Coke Company \$5,300, and having given the company an order for 5,000 tons of coal, it was agreed between himself and the company's president that the coal to be shipped on the order should constitute a proportional payment of said

loan. On said 5,000 ton order the receiver shipped 2,897.55 tons and refused to deliver the residue.

### CONCLUSIONS OF LAW.

1. The status of the creditors was fixed as of the date of the receiver's appointment. On that day the company's property passed to the custody of the law. Subsequent events could neither modify nor enlarge the rights of creditors: *Cowan v. Plate Glass Co.*, 184 Pa. 1.

2. The receiver held the legal title of the trust estate for distribution to creditors according to their rights and priorities: *Cowan v. Plate Glass Co.*, 184 Pa. 1; *Peckham's Assigned Estate*, 35 Supr. 330.

3. The rights of creditors being thus impressed upon the trust, plaintiff and defendant were powerless to create the preference and payment set up by the defendant.

4. The receiver's suit against the defendant is not barred by their joint participation in the illegal preference and payment—for the action, in the receiver's name, is in law and equity the act of the court pursuing and recovering trust assets converted by the defendant to his own use, and in violation of the rights of other creditors.

Rule absolute.

For plaintiff, *Griffith & Mitchell.*

For defendant, *Wm. A. Jordan.*

One obtaining a conveyance from the state under an unconstitutional statute providing for the disposal of land upon which the taxes are delinquent by a so-called redemption is held, in *Bradbury v. Dumond* (Ark.) 11 L.R.A. (N.S.) 772, to have sufficient color of title to perfect a title by adverse possession under the statute of limitations. A note to this case reviews the other authorities on effect of an invalid tax deed as color of title within general statutes of limitations.

action at law and suits in equity before, during and after the proceedings in bankruptcy against the partnership; and that the discharge of the partnership, where the partners are not adjudicated bankrupt, does not discharge the partners from their liability for the partnership debts.

**Court of Common Pleas No. 2,***ALLEGHENY COUNTY.***FIZGIBBON v. THE PITTSBURGH  
& LAKE ERIE R. R. CO.***Railroads—Widening—Powers of railroad—  
Purpose of condemnation.*

In pursuance of an arrangement between the B railroad and the C railroad for a relocation of tracks B condemned a lot belonging to A. The lot was intended to be used entirely for B's tracks, and B had for some time contemplated the change in question without reference to the C railroad. A filed a bill to restrain B, on the ground that this was not a widening or straightening of its roadway. Bill dismissed.

No. 281, January Term, 1908. Sitting in Equity.

Opinion by SHAFER, J. Filed January 22, 1908.

The bill was originally filed to prevent the defendant from taking lands of the plaintiff under the right of eminent domain without giving bond. A bond was then tendered and refused, and presented to the court upon notice and exceptions filed thereto by the plaintiff, which are still pending. After the presentation of the bond in court, the plaintiff amended his bill, praying for an injunction against the defendant to prevent it from taking the land proposed to be taken by it, even if a bond should be approved, upon the allegation that the defendant company is not endeavoring to take the plaintiff's land to straighten and widen its road, but that its purpose is to give another railroad a right of way along the river beside and partly over its own tracks, and that the defendant has no right to take the plaintiff's land for that purpose. Upon this amended bill a hearing was had upon motion to continue the injunction originally granted. On this hearing the facts appeared to be as follows:

The plaintiff's land in question in this case consists of a lot some 35 feet wide and 70 or 80 feet deep, extending to low water mark on the south side of the Ohio river, in the city of Pittsburgh. The southern boundary of plaintiff's lot is land belonging to the defendant company, used by it as the

main line of its railroad, the ownership of the land in the railroad being in fee simple.

On November 28th, an agreement was entered into between the defendant company and the Wabash Pittsburgh Terminal Railway Company and the West Side Belt Railway Company, which recites the desire of the defendant company to improve the grade and alignment of its railroad near the point in question, the agreement of the parties to exchange certain lands for their mutual accommodation, and the settlement of certain disputes existing between them; that these properties should be exchanged; that the West Side Belt Railway Company should abandon its coal tipples at the mouth of Saw Mill Run, a short distance down the river from the place in question; that a traffic agreement should be made between the parties to enable them to exchange freight; and that certain additional tracks should be built for this purpose, and that each company should build a certain designated part of the tracks and should own and maintain the same, these being shown by reference to a plot which was given in evidence, marked exhibit D. From this and the testimony of witnesses, it appears that the intention is to take the land of the plaintiff and other lands in line therewith next to the harbor line of the river, to move the four main line tracks of the defendant company upon the land of the plaintiff and to put upon the land now occupied by the main line tracks a number of tracks, which should constitute what is called in the agreement an interchange yard, it appearing from exhibit B that the proposition is that the defendant company shall put down, in addition to the four main line tracks, five other tracks south of the property now belonging to the plaintiff and upon the land now occupied by the main line, these tracks running into and connecting with a like number of tracks to be built by the Wabash Railroad, the connection being some two hundred feet down the river from the plaintiff's land. It therefore appears that all the tracks proposed to be put upon the plaintiff's land, if it is taken, and the tracks to be put upon the land adjoining the land of the plaintiff, are tracks of the defendant company, and as we understand it the only

reason upon which the plaintiff alleges that this construction is not a bona fide widening or straightening of the road, is because the tracks to be built where the main line is are intended to connect with tracks of the Wabash Railroad, and that the parties have agreed that this is to be the case. We are quite unable to understand why what is proposed to be done is not a proper and legitimate exercise of the powers of the defendant company to widen its tracks.

It further appears that the construction proposed will to some extent straighten the main line of the defendant company, which at this place is upon a curve.

It appeared by the evidence given by the defendant company that it had contemplated such a straightening of the right of way since 1902, long before any agreement was entered into with the Wabash Railroad, and that this was deemed to be impracticable because it could not be done without taking the tipple belonging to the other railroad above mentioned, which tipple it has now agreed to abandon.

For these reasons the motion to continue the preliminary injunction or to grant a such an injunction upon the amended bill, is refused.

For plaintiff, *Marron & McGirr*.

For defendant, *Reed, Smith, Shaw & Beal*.

(Common Pleas No. 2, Allegheny Co.)

### COMMONWEALTH ex rel. RILEY v. CITY OF PITTSBURGH.

*Municipalities—Annexed territory—Councilmen—Act of April 26, 1903, act of May 28, 1907.*

The 6th section of the act of April 26th, 1903, which provides that members of council of an annexed borough shall be members of the city council is superseded by the act of May 28th, 1907, which provides for the creation of new wards in annexed territory and special elections of councilmen.

No. 849, January Term 1908. Mandamus.

Opinion by FRAZER, P. J. Filed February 6, 1908.

By proceedings had under the act of Assembly, approved April 26th, 1903, P. L. 332, the Borough of Sheraden was annexed

to the City of Pittsburgh. The order of the Quarter Sessions Court confirming the annexation having been affirmed by the Superior Court on the 11th day of November, 1907, the borough thereupon became a part of the city. Relator, a member of the Council of the borough, whose term would expire the first Monday of March, 1910, presented himself for admission as a member of the Common Council of the City of Pittsburgh immediately after the affirmance of the decree of the Quarter Sessions Court by the Superior Court, and requested that he be admitted as a member of that body and permitted to take part in its proceedings, relator's claim to become a member of the Common Council of the city being based upon a clause of the 6th section of the act of 1903, above referred to, which reads as follows:

"And the members of council of an annexed borough shall be members of the Common Council of the city, and remain until the expiration of the terms for which they were elected and until their successors are duly qualified under the arrangement of the territory into wards."

Upon petitioner's request for admission to membership in the city body being refused, this writ was awarded on his petition, to which defendants demurred, setting up that the defendants named as Mayor of the city and President of Common Council respectively had no power to admit relator to membership in the Common Council, and that his request should have been made to the Council. At the argument, however, this technical objection was not pressed, and we were asked by counsel for the parties to determine relator's right to membership in the Common Council of the city under the law as it now stands. The act of 1903, while somewhat indefinite, it seems to us, was not intended to continue borough councilmen in office beyond the arrangement of the annexed territory into wards of the city. It is true the act says they shall be members of the Common Council "and remain until the expiration of the terms for which they were elected and until their successors are duly qualified under the arrangement of the territory into wards." This language evidently contemplates further action in the way of



either creating a new ward of the city out of the annexed territory or its annexation to an existing ward, and, possibly, if the clause quoted was still in force, might give to borough councilmen the right to serve in the Common Council of the city until that further action was had. However, whether that term of service of borough councilmen in the city council was until the expiration of the term for which elected, is not now material, as the clause of the act of 1903 quoted has in our opinion been superseded by the act of May, 28th, 1907, P. L. 295. This latter act provides for the action the act of 1903 omitted, that is, either the creating of a new ward of the city out of the annexed territory or attaching it to an old one. The act applies specifically to territory "which is now or may hereafter become part of a city," and provides that upon petition to the Court of Quarter Sessions of at least twenty per centum of the qualified voters of the annexed territory, such territory shall be erected into a ward or wards of the city, and such decree made as shall give to the people of the territory representation in the different branches of the city government, including members of both Common and Select Councils. The act also authorizes the court to order a special election to fill the various ward offices and elect members of councils, which officers shall hold office until their successors are elected at the next municipal election. Certainly the legislature did not intend that the annexed territory should at the same time be represented in the Common Council by both hold-over borough councilmen and councilmen elected at a ward election subsequent to annexation, and as the act of 1907 is the latest legislation on the subject, is more specific in its terms than the act of 1903, and gives to the annexed territory the same representations in councils as other wards of equal population have, the reasonable and only conclusion to be reached is that the Legislature intended the latter act to supersede the former. In this case, upon petition of the required number of voters of the annexed territory, the Court of Quarter Sessions, on December 21st, 1907, created the territory embraced within the late Borough of Sheridan into the Forty-third ward of the

City of Pittsburgh, and *inter alia* provided that there should be elected one representative to Select and one to Common Council. True, there is attached to that portion of the decree these words, "subject, however, to any existing laws which may entitle the members of the Town Council of the Borough of Sheraden to be members of the Common Council of said city." This clause, however, is of no effect, because, as we have found, the only law to that effect was the clause in the 6th section of the act of 1903, which was repealed by the act of 1907. It therefore follows that petitioner is not entitled to membership in the Common Council of the city of Pittsburgh, and that representatives to both the Select and Common bodies should be elected at the municipal election following the decree of December 21st, 1907, which is the coming February election.

The demurrer sustained and petition dismissed at costs of petitioner.

For plaintiff, *N. R. Criss.*

For defendant, *W. B. Rodgers.*

(Common Pleas No. 2, Allegheny Co.)

## GREEK v. BOROUGH OF LEETS-DALE et al.

*Roads—Location — Travelled lines—Act of June 19, 1901.*

Where the travelled portion of a road is within the original lines of the road as legally established, on widening to the full width the road should be widened according to the original lines and not according to the center of the travelled road.

No. 513, January Term, 1908.

Opinion by SHAFER, J. Filed March 17, 1908.

The bill is for an injunction to restrain the defendants from entering upon plaintiff's land, and removing a fence therefrom, in the process of opening to its full width a street in the defendant Borough.

### FINDINGS OF FACT.

1. The plaintiff is the owner of a tract of land in the Borough of Leetsdale, fronting some 300 feet on the street in question, having acquired title thereto in the year 1900.

2. At a very early time in the settlement of the western country, and apparently before the erection of the County of Allegheny, a public road was laid out from Pittsburgh to Beaver on the right bank of the Ohio River. The earliest record produced upon the trial was that of proceedings at No. 5 August Sessions, 1827, which is a petition for a relocation of that part of the road lying in the County of Allegheny, upon which a report of viewers laying out and fixing the road was presented and confirmed, the width of the road being fixed at 50 feet.

3. In 1851 W. C. Dunn, having purchased from the Economite Society that part of their lands which lay in Allegheny County, laid out and put on record a plan of lots, recorded in the Recorder's Office of Allegheny County in Plan Book 1, Page 62, which shows as the northern (or, as the road lies at the point in question, rather eastern) boundary of his plan the Beaver Road as of a width of 50 feet, forming one of the boundaries of a lot which is described by courses and distances lying between the Ohio and Pennsylvania Railroad, now the Pittsburgh, Fort Wayne & Chicago Railroad, a cross road, the Beaver Road and the outside line of his land. The land on the east side of the road including the land of the plaintiff was not laid out in lots, but at that time belonged to Dunn.

4. At No. 10 June Sessions, 1879, a petition was presented to the Court of Quarter Sessions of Allegheny County, which set out that the draft of the road accompanying the proceedings in 1827 above mentioned had been lost, and that there were additional reasons for relocating the road from the Borough of Sewickley down the River to the Beaver County line, and the result of this proceeding was the laying out of the road on a certain line therein reported between those points, the width of the road from the Borough of Sewickley to the bridge over Little Sewickley Creek being fixed at 50 feet and from Little Sewickley Creek to the bridge over Big Sewickley Creek, being the line of Beaver County and including the part in question, it was fixed at 40 feet.

5. At No. 8 March Sessions, 1908, the County Commissioners presented to the

Court of Quarter Sessions their resolution under the act of June 26th, 1895, P. L. 336, to improve the road in question, and surveys and plans of the road and the proposed improvement, which plans and surveys were presented to the Grand Jury and were approved by the Grand Jury and the Court, and the road was in fact improved under the act by the making of a cartway of macadam or similar structure of the width of 14 feet along it. At the time of making this survey the plan of the road annexed to the proceedings in 1879 above mentioned had also been lost, and the plan was made by sending a surveyor upon the ground, who took the fence and house lines as they actually were upon the ground at the time of making the survey, and measured the distances from the angles in the road as they then appeared, giving the size of the angles but not their relation to the points of the compass; in front of the land of the plaintiff the road was in fact about 31 feet wide between the fences, as appears from the scale of the plan, although no width is otherwise given, and this figure appears from the surveyor's notes made at the time to be substantially correct. The plan mentions no width of the road, nor does it show a vacation of any part of the road or any change or relocation of any part of it, at least near the place in question.

6. Thereafter the Borough of Leetsdale was erected out of part of Leet Township, including the road in question and the lands of the plaintiff. Sometime thereafter the borough granted to the Ambridge, Leetsdale & Edgeworth Railway Company the right to lay a street railway along the street in question, and the Pittsburgh Railways Company, one of the defendants, appears to have the rights of the first named company in that respect, and to be engaged in building a street railway along the street. The borough caused a survey of the street in question and other streets to be made by the borough engineer, and from the result of his survey determined that the fence of the plaintiff was out upon the 40-foot street a distance of five feet more or less, and the borough authorities in conjunction with the railways company proceeded to take down the plaintiff's fence and to open up the street to

its full width of 40 feet, by taking this amount of ground from that which had before been within the plaintiff's enclosure, and this is the injury complained of, the sole question of fact in the case being whether or not the land so taken is or is not a part of the street.

7. In preparation for the trial in this case each of the parties caused surveys to be made, and one of the engineers employed by the plaintiff turned out to have in his possession a blue-print of the copy of the plan attached to the proceedings at No. 10, June Sessions, 1879, which was made in 1893, and was received in evidence, the making of the original copy and of the blue-print and of the loss of the copy itself having been proved. The monuments upon the ground relied upon by the parties were the county bridge over Big Sewickley creek, at the Beaver county line, certain stone walls along the road, the distance of which from the road was indicated on the plan of the Commissioners and the property lines of the adjoining properties. These last appear to be of value because the survey of 1879, which is the last survey laying out the road, appears to correspond very closely at this point with the plan of W.-C. Dunn, the owner of the land by whom it was divided into parcels and sold. It further appeared that the bridge above mentioned had been more or less altered from time to time and that the wall or walls relied upon as giving the side of the road had been rebuilt wholly or in part at some time. It also appeared that in order to make the survey of 1879 fit the road, it was necessary to change one of the angles as given on the survey at the point in question into the other quadrant, but this change was plainly the correction of a mere clerical error, as the angle given on the survey would carry the road much farther into the plaintiff's land than is contended for even by the defendants.

8. While it is difficult to be sure of the exact position of the 40-foot road as laid out in 1879, for the reasons above stated, we are of opinion that the weight of the evidence is with the defendants, that the encroachment upon the road indicated by the fences being but 31 feet apart, along a 40-foot street, is largely if not wholly on the side of

the plaintiff, and we therefore find that the defendants in placing the railway and curb along said street, as they are now engaged in laying the same, are putting the same upon the 40-foot street as it was laid out by the proceedings in 1879 above mentioned. It will be observed that the plaintiff in the second paragraph of his bill alleges that the Beaver road always was a 33-foot road, and in the third paragraph that the taking of his land was done by the borough under the pretext or claim that the road was a 40-foot road, and the whole bill is founded upon that claim. He, and his predecessors in title and occupancy of his land, appear to have acted upon that idea for a long time, as it appears from the evidence of witnesses and photographs given in evidence that a fine row of evergreen trees is planted along the front of plaintiff's property on what would appear to be the sidewalk of the street if the defendants' contentions are correct. The center of the actual travelled way in front of plaintiff's property both before and after the improvement of it by the county was nearer the south or west side of the street than the other side by some feet, it appearing that there was a ditch along the plaintiff's side of the street and between the ditch and the travelled cart way a line of telegraph poles.

#### CONCLUSION OF LAW.

1. The plaintiff contends that the proceedings of March Sessions, 1898, for the improvement of the road under the act of 1895, fixes the boundaries of the road and reduces the road to the width of 31 feet, that is the width between the fences as marked on the Commissioners' plan. As the road which the Commissioners were about to improve was 40 feet wide, and their plan for its improvement showed no vacation of any part of it, but merely indicated the line of the road, we are of opinion that no part of it was or could be vacated by that proceeding, and therefore that these proceedings have no effect whatever upon the width of the road, which has now become a street in the defendant borough.

2. The plaintiff also contends that even if the proceedings under the act of 1895 have no effect upon the case, the rule supposed to be laid down in the case of *Furniss v. Furniss*, 29 Pa. 15, is to be applied in the

present case, and that in opening the road to its full width the center of the traveled portion of the road should be taken as the center of the 40 feet and the road widened equally upon each side of that center. In reply to this the defendants set up the act of June 19th, 1901, P. L. 573, which provides that in all cases, past or future, where a road has been opened with the travelled roadbed located within the original lines by which road was laid out, such lines shall remain the boundary of the road until changed by due course of law. As was said in the opinion of the Court below adopted by the Supreme Court in the case of *Gray v. North Versailles Township*, 208 Pa. 77, this was "evidently passed to modify the extreme ruling in *Furniss v. Furness*," supra. There can be no doubt that the present case is within the terms of this act. Whether or not it is within the power of the Legislature to change the existing law in this way, so as to affect the rights of parties existing before the passage of the act, we do not deem it necessary to discuss, nor was any such question argued by counsel. The road was presumably laid out on its true location when first laid out, and the fact that at a subsequent time the center of the travelled road is found not to coincide with the center of the land taken for the road can not change the location of the road. The cases relied upon by the plaintiff all depend upon the fact that the road was not laid out on the ground upon the location fixed by the order of Court, and the rule that the power of supervisors to open the road was exhausted after they had opened it, whether upon the right location or not.

We are therefore of opinion that the plaintiff has not shown a case entitling him to an injunction and that the bill must be dismissed.

It is therefore ordered that the bill be dismissed with costs to be paid by plaintiff.

For plaintiff, *J. M. Stoner and C. L. Stevenson*.

For defendant, *Thomas W. Neely and Reed, Smith, Shaw & Beal*.

One in possession and control of a ferocious wolf on a public highway is held, in *Hays v. Miller* (Ala.) 11 L.R.A. (N.S.) 748, to be liable, whether he is the owner or not, for injuries inflicted by it on another person.

## Court of Common Pleas, CLINTON COUNTY.

### LIPEWITZ v. SIGLIN.

*Justice of the peace—Defective return—Amendment—Partnership.*

A defective return of a summons issued by a justice of the peace may be amended before judgment. Where a summons of a justice of the peace is served upon one only of two partners sued as partners, and judgment is entered generally against the partnership and against the two individuals, the judgment may be affirmed as to the partnership and the partner served, but reversed as to the other.

No. 116, October Term, 1907. Exception to judgment of justice of the peace.

Opinion by HALL, P. J. Filed March 11, 1908.

The defendants' first exception in this case is overruled for the reasons given in our opinion filed in the case of *Smoder v. Siglin* to October Term, 1907, No. 111, overruling the defendants' first exception in that case.

The defendants' second exception sets up, first, that the original return of service endorsed upon the summons by the constable is insufficient and defective. This may be conceded. Upon the return-day of the writ, however, at the hearing, in open court, on motion of the attorney for the plaintiff, the alderman granted leave to file an amended return, which was filed before judgment was rendered. This was a perfectly proper proceeding upon the part of the alderman, and he was entirely within his rights in granting the amendment, in fact it was his duty, if necessary, to make the record agree with the facts of the case. *Hildreth v. Riley*, 2 Kulp 270; *Newcome v. Miner*, 5 Kulp 328. The action is against the firm of Peck & Siglin, and the amended return shows service on C. G. Seglin, one of the partners. Of course, under this return there can be no valid judgment against the other partner, F. W. Peck, individually. The judgment is rendered generally against the defendants. It is quite probable that the alderman had in his mind in rendering this judgment that he was rendering the judgment against the firm and designated it in that way. As the lan-

guage of the judgment is ambiguous, however, we will affirm it against the defendants served, to wit, the partnership, Peck & Siglin and C. G. Siglin individually, and reverse it as to F. W. Peck, who was not served. Defendants' counsel argue that we cannot do this, and cites *Murdy v. McCutcheon*, 95 Pa. 435; *Boaz v. Heister*, 6 S. & R. 18; *Donnelly v. Graham*, 77 Pa. 274. In none of these cases was the suit against a partnership. They were all against parties sued as individuals on a joint undertaking, and therefore they do not apply to this case. Service on one partner is good not only against him individually, but also against the firm; and the Supreme Court has held that in an action before a justice of the peace suit may be brought in the firm name without even giving the names of the individual partners.

The counsel for the exceptants, on argument, made further objection to the amended return that it set forth the service of a certified copy "instead of a true and attested copy" as required by the act. There is no difference whatever in the meaning of the two expressions. The Century Dictionary, and no doubt all other dictionaries, give the meaning of "attest" as "to certify," and a "copy" must necessarily be a true copy or it is not a copy at all. The use of the word "true" in this connection is mere surplusage and a relic of the verbosity of legal expression in a former age. A certified copy is necessarily therefore a true and attested copy.

We are far from sure that the judgment as rendered could be considered a judgment against F. W. Peck individually, but for fear it might be so considered we will modify the judgment so as to affirm it as to the copartnership of Peck & Siglin and as to C. G. Siglin individually; otherwise the exceptions are dismissed.

For plaintiff, *C. S. McCormick*.

For defendant, *T. C. Hipple*.

The right of property owners to an injunction against a neighboring owner who rents the property for use as a house of prostitution is sustained in *Tedescki v. Berger* (Ala.) 11 L.R.A. (N.S.) 1060.

### Book Notice.

LEGAL PHILADELPHIA. Comments and Memories by ROBERT DAVISON COXE, Esq., of the Philadelphia Bar. WILLIAM J. CAMPBELL, Publishers, 1908.

It is said by the author that in these days of law firms and sky-scraping offices professional individuality has almost disappeared and the lawyers are of a monotonous pattern. The author questions seriously whether the training of the law school equals that formerly received from an able and forceful preceptor. That the Bar of Philadelphia, like the Bars in other large cities, has changed greatly in the last twenty-five years in the character of its members and the methods of practicing law, is shown in this interesting and delightful book, which is a personal reminiscence of the leading Philadelphia lawyers of the old school, most of whom are known by reputation to the lawyers of this State.

In the case of *In re Bertenshaw*, 19 Am. B. R. 557, a partnership was adjudicated bankrupt, but none of the partners was adjudged a bankrupt. Application was made to the court to order an unadjudicated partner to turn over his property to the trustee of the partnership estate for administration in bankruptcy. It was held that the court of bankruptcy was without jurisdiction to summarily take and administer in the proceedings against the partnership, the individual estate of the solvent partner without his consent. It was held, however, in the *Bertenshaw* case, that the partnership creditors may pursue unadjudicated partners by

A certificate of acknowledgment to a deed stating that two persons whose names are subscribed to the instrument appeared and acknowledged "that he executed the same" is held, in *Hughes v. Wright* (Tex.) 11 L. R.A.(N.S.) 643, not to be so defective as to prevent the recording of the instrument, since the word "each" may be supplied by construction.

In the case of *National Surety Co. of New York v. Medlock*, 19 Am. B. R. 654, the Court of Appeals of Georgia hold that a liability on account of a libel is not released by a discharge in bankruptcy.

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No. 48.

PITTSBURGH, PA., JUNE 10, 1908.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### KRANYAK v. BESSEMER COKE CO.

#### *Negligence—Death—Non-resident aliens.*

At the time of K.'s death, resulting from injuries received in a coal mine, one of his children was living with him; his wife and two children being non-resident aliens. Held, in directing a verdict for defendant, (a) that the defendant's alleged negligence was a guess; (b) that K was guilty of contributory negligence; (c) that non-resident aliens had no standing to sustain the action; and (d) that the child living with him had not shown a reasonable expectation of pecuniary advantage—for he had supported himself and helped to support his father.

No. 459, September Term, 1902. In remotion (ex parte plaintiffs) for a new trial.

Opinion by BROWN, P. J. Filed March 10, 1908.

At the trial the court directed a verdict for the defendant.

The action was brought by Joseph Kranyak, Mary Kranyak and John Kranyak, by their next friend, against the Bessemer Coke Company, to recover pecuniary loss resulting from the death of their father, Mike Kranyak, injured in the mines of the defendant company, November 26th, 1901, and dying the following day.

He left surviving him a widow and the three children named—the widow and two of the children (Mary and John) being non-resident aliens residing in Hungary.

Joseph, the eldest son (then nineteen years of age), was living with his father at the latter's death.

The widow and the two children (Mary and John) have no right of action against the defendant: *Deni v. Pennsylvania Railroad*

Co., 181 Pa. 525; *Maiorano v. R. R. Co.*, 216 Pa. 402.

Joseph is the only child having legal standing to maintain the action, and his right of recovery rests upon two essential grounds:

(a) That the sole proximate cause of death was the negligence of the defendant.

(b) That he suffered an expectant pecuniary loss.

*The jury might guess that death resulted solely and proximately from defendant's negligence—but it would be a guess pure and simple.*

He was a miner. On the afternoon of November 26th, 1901, he was found injured in the mine railway tunnel through which the coal was transported from the workings to the mouth of the mine.

No one saw him at the time of the injury.

Whether he had been riding on the train that struck him, or had been walking along the tunnel-way at the moment of the accident, or just prior had fainted and fallen no one knows.

In using the tunnel railway line he was violating the well-known rules of the company prohibiting it, and he was constantly in the presence of manifest danger from transportation trains passing over it—and taking the chances he took the risk and was guilty of the grossest negligence.

The danger of using the way was notoriously and obviously clear to him—for trains were frequently running over the line.

If by any rule of reasonable certainty a jury might find that his death resulted solely and proximately from the defendant's negligence, his son Joseph cannot recover—for there is no evidence (a) "showing a reasonable expectation of pecuniary advantage," nor (b) sustaining any presumption to that effect: *Lewis v. Hemlock's Creek & Muhlenberg Turnpike Co.*, 203 Pa. 511.

The testimony is that as soon as he arrived from Hungary he got work in the mines, earning at first six dollars per week, and later higher wages. Until his father's death his earnings (more than sufficient to support himself) went to the support of himself and his father.

New trial refused.

For plaintiff, *E. L. Kearns.*

For defendant, *W. T. Tredway.*

**Court of Common Pleas No. 2,**  
**ALLEGHENY COUNTY.**

**HANNAN v. VIS et al.**

*Contract—Part failure of performance—Equity.*

A agreed to purchase B's licensed saloon, \$500 to be paid by check, dated ahead, and the balance in money, secured by mortgage of A's real estate, which mortgage B was to raise from the C Brewing Company. C refused to lend the money. Held, that this relieved A from his obligation to purchase and B would be restrained from using the check.

No. 307, January Term, 1908.

Opinion by FRAZER, P. J. Filed February 19, 1908.

The purpose of this bill was to enjoin the defendants from negotiating or collecting a check made by plaintiff to the order of the defendant, Vis. From the bill, answer and proofs, we find the following facts:

**FINDINGS OF FACT.**

1. On September 21st, 1907, the defendant, Vis, as the agent of the defendant, Snyder, who is the owner of a licensed hotel situate in O'Hara township, which he desired to sell, offered the same to plaintiff at the price or sum of \$7,700. After an examination of the premises, plaintiff agreed to purchase the same for her son-in-law, Jacob Oberly, at the price named, and thereupon gave to the defendant, Vis, her check for \$500, drawn on an interest bearing account which she had in the Farmers & Mechanics Bank of Sharpsburg, the same being payable November 2nd, 1907. Exhibit A, in plaintiff's bill, is a copy of the receipt given by Vis to plaintiff for the payment.

2. At the time of receiving the check for \$500, Vis agreed with plaintiff to secure for her from the Independent Brewing Company of Pittsburgh upon a mortgage on the Snyder property and other property in the borough of Sharpsburg owned by plaintiff, the balance of the purchase money. Without the money to be raised on the mortgage as indicated, plaintiff was not able to carry out the purchase, which fact was known to Vis.

3. Vis made application to the Independent Brewing Company for a loan of \$7,200 to be secured by plaintiff giving a mortgage

upon the Snyder property and her own property in Sharpsburg. The company upon investigation refused to provide the money. Upon the refusal of the Brewing Company to make the loan, unsuccessful applications were made by Vis to other persons.

4. As a result of the failure of Vis to secure the \$7,200 required to complete the sale, the deal was not carried out, and the application for a transfer of the license from Snyder to Oberly, the son-in-law of plaintiff, was withdrawn before a hearing by the court.

5. The claim of defendant that plaintiff agreed to pay Snyder the sum of \$200 out of the check for \$500, to compensate him for closing his bar during the 10 days immediately preceding the date fixed by Court for hearing the application for transfer, is not sustained by the evidence. On the contrary, the weight of the evidence is to the effect that plaintiff would get her money back if the loan was not secured on the mortgage, or the court should refuse to transfer the license.

**CONCLUSIONS OF LAW.**

1. The testimony clearly shows that plaintiff was unable to raise more than \$500 in cash on account of the price to be paid for the Snyder Hotel, and that a purchase of the property by her depended solely upon the success of Vis, who was the agent of Snyder, in securing a loan on a mortgage upon the two properties referred to in the second finding of facts. This he was unable to do, notwithstanding his positive assurances to her of his ability to do so. Under these circumstances there could be no sale, and plaintiff would be entitled to the return of her check unless she agreed to compensate Snyder for closing his bar while the transfer proceedings were pending. No agreement on the part of plaintiff to make such compensation having been shown, she cannot be required to make such payment. This is especially true in view of the fact that the failure to conclude the sale was not the result of any fault upon her part.

2. In accordance with the foregoing, we conclude that an injunction should be issued as prayed for.

Let a decree be drawn accordingly.

For plaintiff, *J. E. O'Donnell*.  
For defendant, *L. K. & S. G. Porter*.

**Orphans' Court,**  
**ALLEGHENY COUNTY.**

**In re Estate of SUSANNA BICHSEL,**  
**Deceased.**

*Wills—Power of sale—Jurisdiction of Orphans' Court.*

The Orphans' Court has power to control the exercise of a testamentary power of sale.

No. 237 April Term, 1908.

Opinion by *HAWKINS, P. J.* Filed April 22, 1908.

The fourth section of the act of March 29, 1832, leaves no room for doubt that this court has jurisdiction to control testamentary trustees in the exercise of power of sale given them. It embraces all cases wherein they "are or may be possessed of, or undertake the care and management of, or are in any way accountable for any real or personal estate." The power thus given is so broad that even credit in an executor's account for proceeds may be stricken out when the court thinks the sale ought not to stand: *Dundas Appeal*, 64 Pa. 325. The ground of interference is impending loss to the estate: *Brittain's Appeal*, 28 Superior Court 144. Inadequacy of price is one of the recognized grounds: *Meyer's Estate*, 192 Pa. 461; *Ficke's Estate*, 16 Sup. Ct. 41; and sales are frequently set aside when security is offered that the property will bring a higher price at a resale: *Bower's Appeal*, 84 Pa. 311. The amount of the advance must however be such as will pay the expenses of a resale and leave a substantial margin. The offer made here of \$700 is certainly enough. But it does not follow because the executor's contract will now be set aside that the new offer shall be accepted. In view of the existence of competition shown by this latter bid it may be that a still higher bid may be had and the executor ought therefore to make further inquiry, and perhaps public sale may be advisable. It would be well also to confer with the beneficiaries under the will in regard to the matter.

For petitioner, *Williams & Edwards*.  
For exceptants, *C. E. Theobald*.

**Court of Common Pleas,**  
**WASHINGTON COUNTY.**

**PARSHALL v. THE BANK OF COAL CENTER.**

*Banks—Act of April 16, 1850—Check—Refusal to pay—Petition to compel payment—Demurrer.*

A petition under the act of April 16, 1850, P. L. 477, by the payee of a check to compel its payment by the bank upon which it is drawn, is defective when it fails to state that the bank was incorporated under the act of 1850 and it fails also to allege that it is a bank of issue.

No. 208 February Term, 1908. Petition under act of April 16, 1850, P. L. 477, to compel payment of check.

Opinion *PER CURIAM*. Filed April 9, 1908.

The plaintiff in this case presented his petition alleging "that the defendant was a state banking institution, organized and incorporated under the laws of the state of Pennsylvania, and doing business in Washington County, Pa." It further alleges that Victor Russell at different times deposited with the said bank sums of money which were credited to his account on the books of the bank, and that his said account was subject to check, and that at the date of the presentation of the petition there was in the said bank to the credit of the said Victor Russell the sum of \$415. It is further alleged by said petitioner that on the 29th day of January, 1908, the said Russell for value assigned to him \$200 of said deposit and issued his check payable to him for the said sum, and gives a copy of said check which is in these words:

"COAL CENTER PA., January 29, 1908.

"Pay to the order of John Parshall Two Hundred (\$200) Dollars.

"To the Bank of Coal Center,

"Coal Center, Pa.

his  
"(Signed) VICTOR X RUSSELL."  
mark

"(Witness:) M. Shire—Sam Levine."

"Endorsed: John Parshall."



and that he, the petitioner, had presented said check at said bank and demanded payment, which was refused.

The prayer is that the court direct a citation to be issued by the prothonotary of this county to Clifford Drum, the cashier of said bank, or other proper officer thereof, in the nature of a summons, according to the act of assembly in such cases made and provided, demanding him or them to appear in court to answer his complaint.

On February 4th, 1908, the defendant bank, after service of the citation, appears and demurs to the plaintiff's complaint and say that the same is not sufficient in law.

We have two acts of assembly providing for the incorporation of state banks or corporations doing a banking business: The first is the act of 1850 under which this petition is filed and the other is the act of May 13, 1876, P. L. 161. Banking corporations under the act of 1850 were given authority to issue bank notes and were called banks of issue. Corporations doing business under the act of May 13, 1876, were banks of deposit and discount, but had no authority to issue bank notes as provided in the act of 1850.

The petition filed in this case we think is deficient; first, in that it does not designate under which of these acts of assembly the defendant company was incorporated and does not state that the defendant company was a bank of issue. This in our opinion is fatal to the petition and justifies the demurrer filed.

In the case of *Dreisbach v. Price*, reported in 133 Pa. State Reports 560, it was held that the act of 1850 which provides the remedy which the petitioner here seeks to invoke has no application to banks other than those whose charters give them a right to issue bank notes, and this being the case it becomes a material allegation that should appear in a petition of this kind that the defendant is not incorporated under the act of 1876 but was incorporated under the act of 1850 and was a bank of issue. This allegation is not in the petition filed, and it is not controverted as a matter of fact outside of the petition that the defendant was incorporated under the act of 1876.

Another difficulty in the plaintiff's case

is that the deposit in the defendant bank here was made by Victor Russell and the money owing by the bank was to him and he is not made a party to this proceeding and is not in court assenting to it any way. The petition alleges that \$200 of the deposits however were assigned by Victor Russell to the petitioner for value, and then immediately follows this allegation by saying that a check was given by Victor Russell to the petitioner and a copy of that check is set out. From this we infer that the petitioner means to allege that by reason of the giving of this check there was an assignment of \$200 to him. This in our opinion is not a justifiable conclusion. The giving of a check by one who has a deposit in bank to another for a part of the funds in the bank is not an assignment either legal or equitable of the money held on deposit by the bank and the bank is not bound to pay the money called for in the check to its payee. "It has been repeatedly held that the holder of a bank check has no right of action on the check against the bank. Although there may be funds of the drawer sufficient to pay the check in the hands of the bank at the time of presentment and no other appropriation of them made, yet the bank may refuse payment without subjecting itself to a suit by the holder."

In *Harrisburg National Bank's Appeal*, 10 Weekly Notes 41, it is held that "an ordinary bank check is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee nor any valid claim to the funds of the drawer in his hands."

In a case decided January 6, 1908, entitled "*Tibby Bros. Glass Co. v. The Farmers & Merchants Bank of Sharpsburg*," to be reported in 220 Pa. State Reports, at page 1, the Supreme Court say: "In this state there is no contractual relation between the payee of an unaccepted check and the bank on which the check is drawn and no action will lie by the payee in his own name against the bank, although it has sufficient funds of the drawer at the time the payment is refused. A check is neither a legal nor an equitable assignment or appropriation of a

corresponding amount of the drawer's funds in the hands of the drawee, and it gives the payee no right of action against the drawee nor any valid claims to the funds of the drawer in his hands." Of course this would not apply where there had been an acceptance of the check by the bank nor where the claimant's claim to the fund in the bank was upon a written assignment of the deposit and not an ordinary check; but in the case at bar the petitioner, as we have already said, evidently has no assignment other than that which he inferred that he had from the possession of the check. At all events, if he had an assignment which he held in addition to the check, the petition is insufficient in that it does not give a copy of the assignment if it was in writing, or if verbal, give the facts which constituted in law such an assignment.

We are therefore clearly of the opinion that the petition in this case is insufficient and that the demurrer should be sustained.

And now, April 9, 1908, this case came on to be heard and was argued by counsel, whereupon, upon due consideration, the defendant's demurrer is sustained and the plaintiff's petition is dismissed at his costs.

For plaintiff, *J. N. Patterson, Esq.*

For defendant, *A. M. Linn, Esq.*

[From Harry Russell Myers, Esq., Washington, Pa.]

## Court of Common Pleas,

DAUPHIN COUNTY.

### BUCK'S INSOLVENT ESTATE.

*Bankruptcy—Farmer—Preference of creditors—*

*Return of property—Power of court to enforce order—Act of 1901.*

In the insolvent estate of a farmer under the act of 1901, P. L. 408, the court has power to order creditors who have received personal property as a preference to hand over the same to the receiver, and to enforce such order by attachment of the person or sequestrations of the property of the person in default.

The act of 1901 intends that the estate of the insolvent should be administered and distributions made by a receiver as the officer of the court and acting under the direction of the court.

No. 706 January Term, 1908. Rule to show cause why certain personal property

should not be surrendered to the receiver.

Opinion by McCARRELL, J. Filed March 31, 1908.

On January 11, 1908, upon petition of creditors of Jacob Buck, filed in this court under section 7 of the act of June 4, 1901, P. L. 408, the court granted a rule to show cause why a receiver should not be appointed for the estate of the alleged insolvent, Jacob Buck, and why all legal proceedings there against, if any, vacated and set aside.

Notice of this rule was given to Jacob Buck, the alleged insolvent, and to his various creditors, including W. H. Rapp and Levi Miller.

In pursuance of this rule, testimony was taken at the bar of the court in regard to the various matters alleged in the petition of creditors, and at this hearing W. H. Rapp and Levi Miller were present in court and gave their testimony.

After carefully considering the testimony thus taken and the arguments submitted thereon, the court on February 25, 1908, made an order finding that the said Jacob Buck is an insolvent within the contemplation of the act of June 4, 1901, P. L. 408, entitled: "An act relating to insolvency; embracing, among other matters, voluntary assignments for the benefit of creditors, and adverse proceedings in insolvency by creditors; forbidding, also, certain preferences; providing for the distribution of the insolvent's estate, and in certain contingencies relieving him, and others liable with him, from further liability for his or their debts."

The court further found that the said insolvent, Jacob Buck, during the last four months preceding the filing of the petition against him, with a view to giving a preference to W. H. Rapp and Levi Miller, two of his creditors then having claims against him, did assign, transfer or pledge for a debt then existing to the said W. H. Rapp and Levi Miller, certain articles of personal property, more specifically appearing in a schedule attached to said order and made a part thereof and marked "Exhibit A," and the court thereupon, in accordance with the provision of the said act of assembly appointed David H. Reigle as receiver of the

estate of the said insolvent, and directed that he be clothed with all the powers vested in such receiver by the said act of assembly.

This receiver has since duly qualified and has given bond, approved by the court, and, as required by the act, has filed a schedule of property alleged to belong to the said insolvent.

On February 26, 1908, the said receiver presented to this court his petition, alleging that W. H. Rapp and Levi Miller, two of the creditors of said insolvent, had in their possession certain personal property, particularly described in "Schedule A" attached to his said petition, and being the said property referred to in the schedule attached to the aforesaid order of court, and asking the court for an order directing the said W. H. Rapp and Levi Miller to turn over to him, as such receiver, the said articles of personal property.

Upon this petition the court granted a rule upon W. H. Rapp and Levi Miller to show cause why a peremptory order should not issue, commanding them to turn over the said property to David H. Reigle, the receiver, and directing that pending the determination of said rule the said W. H. Rapp and Levi Miller, should not dispose of the said personal property.

An answer to this rule was filed by the said W. H. Rapp and Levi Miller on March 7, 1908.

In this answer W. H. Rapp and Levi Miller admit that they have in their possession the personal property mentioned in said schedule, and allege that the same belong to them, and claiming that they are entitled to hold the same until the question of their right has been passed upon by a jury.

In their answer they do not show by what title they claim this property, nor under what circumstances they acquired it. They practically admit that it was previous to its coming into their possession the property of Jacob Buck, who has been found to be an insolvent. We assume, therefore, that they acquired possession of the property from Jacob Buck under the circumstances shown by the testimony taken at the hearing upon the original rule granted in this case. That testimony clearly indicated

that at the time of the transfer of said property by Jacob Buck to W. H. Rapp and Levi Miller, the said Jacob Buck was insolvent within the contemplation of the act of assembly aforesaid, and also clearly indicated that they, the said W. H. Rapp and Levi Miller, had knowledge of the financial condition of the said Jacob Buck, and obtained the transfer to them of the said property with intent to secure for themselves a preference over other creditors of the said Jacob Buck.

Upon the testimony thus submitted we find the facts to be that Jacob Buck was then insolvent; that the said W. H. Rapp and Levi Miller had knowledge of his financial condition, and secured and obtained the transfer of the personal property in question with intent to secure for themselves, as creditors of the said Jacob Buck, a preference over his other creditors.

This is in violation of the aforesaid act of assembly, and the question now to be determined under the pending rule is whether or not the court has authority to direct the surrender of the said property to the receiver of the said Jacob Buck.

Our act of assembly of June 4, 1901, is essentially a bankrupt law. It differs in some of its features from the federal law in the same general subject, but it is in entire correspondence with it in its objects and purposes, and not materially different in its methods.

In the present case Jacob Buck, being a farmer, is not amenable to the federal bankrupt law, and therefore no question arises here as to whether the existence of the federal bankrupt law suspends the operation of our act of June 4, 1901.

Our act intended that the estate of an insolvent should be administered and distribution made by a receiver as the officer of the court and acting under the direction of the court.

Section 7 of the act, under which this proceeding was commenced, expressly authorizes the court to make such order or decree as the facts found will justify, and to enforce such orders and decrees by attachment of the person or sequestration of the property of the person in default.

We are of opinion that under the facts

found, as hereinbefore stated, relating to the transfer of the property in question to W. H. Rapp and Levi Miller, the said property should be delivered to the receiver for administration by him, in accordance with the provisions of said act.

The act seems to empower the court to find the facts from the testimony submitted to it, and to make such orders and decrees based upon the facts thus found as may be necessary to secure the administration and distribution of the estate of the insolvent in accordance with the provisions of the law.

Under the act, which provides a complete system for the administration and distribution of the estate of an insolvent, it is provided in section 19 that executions may be stayed by the court in order to enable the property of the insolvent levied upon to be sold by the assignee.

This act of assembly was considered by Mr. Justice Stewart, while president judge of the Franklin district, in the Estate of John S. Hull, reported in 25 Pa. C. C. R. 353. At page 358, the learned president of the Franklin district uses the following language, to wit:

"Having regard to the act as a whole, establishing, as it does, a complete scheme or system of rules for the settlement of assigned and insolvent estates, we are of the opinion that it contemplates an entire transfer of the property into the custody of the assignee, for the purpose of conversion and distribution, unembarrassed by adverse legal process, whenever it is possible or practicable for this to be accomplished, through the intervention of the court. It does not seem to be a question for the court, in any case, whether such intervention will promote, or prejudice, the interests of any concerned. We find no suggestion of such an idea in any part of the act. Notwithstanding the language is that the court may restrain, we are of opinion, from the general purpose of the act, and the absence of all reference to the legal considerations which could operate upon a discretionary power, that this provision in the act is mandatory, and requires the court, whenever the occasion arises, to exercise the power conferred."

He accordingly held that inasmuch as the express purpose of the act is to enable the

property to be sold by the assignee, he was bound to set aside a fi. fa. which had been levied upon personal property prior to the making of the deed of assignment, and accordingly made such order.

The purpose of the act undoubtedly is to secure an equal distribution of the property of an insolvent to and among creditors without preference to any, and in order that this purpose may be secured the court apparently has full power and authority to make such orders and decrees as will produce this result.

After full consideration of all the testimony submitted and of all the circumstances connected with the proceedings in this case, it is now ordered and decreed that W. H. Rapp and Levi Miller, the respondents in the pending rule to show cause, shall deliver to David H. Reigle, receiver of Jacob Buck, within five days from the receipt by them of a certified copy of this order, the personal property referred to in the receiver's petition, filed February 26, 1908, and particularly described in "Schedule A," attached to the said petition, so that the said receiver may dispose of the same and make disposition of the proceeds thereof as required by law.

This order is made without prejudice to the rights of the said W. H. Rapp and Levi Miller, if any such rights they have, to present to the said receiver and this court their claim for expenses which may have been incurred by them in the keeping and maintenance of the live stock mentioned in said schedule and in the storage of the other articles of personal property referred to and in said schedule, such claim when and if presented to be considered by the said receiver and determined by this court in such manner as to right and justice may appear to appertain upon the hearing of such claim.

For receiver, *Wm. H. Earnest.*

For creditors, *E. E. Beidleman.*

(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

## THE ACQUISITION AND RETENTION OF CLIENTS.

LECTURE DELIVERED BY THE HON. JOHN HAMILTON LEWIS TO THE STUDENTS OF THE ILLINOIS COLLEGE OF LAW.

The Friday Evening Lectures at the Illinois College of Law are becoming more popular each week. The high-water mark may well be said to have been reached last Friday evening when the Hon. James Hamilton Lewis spoke to the students. He said in part:

"The subject, how to get clients, is a practical one. It is not often mentioned by your teachers. Yet in the great battle of life is constantly brought to your attention each day. A failure to understand the merits of this discussion means failure to the young lawyer. While an appreciation of its art oftentimes crowns those with success whom we least expect. How a lawyer gets his first client is a mystery. It might well be classed among the three great mysteries of life. Who are clients? Some one in difficulty. What caused the difficulty? Well to answer that would be to explain life. An illustration from a personal experience might be pardonable. As a young lawyer I was once approached by a man who had endorsed a note and had been sued. After listening to his story I remarked: 'If you had not endorsed that note you would not have been liable.' 'Yes,' replied the client, 'if I had not signed that note I would not be here.' In other words it is those difficult situations that give us our opportunities. It is up to us to be able to master them, and as we learn to do so our success is increased.

"The person in difficulty is going to turn first to some one he knows, in whom he has confidence, and who will take an interest in his case. As a basic principle it behooves young lawyers to make friends. And in doing this your manner of treating people will be an important element. If you are not naturally sociable and approachable, break yourself into the habit of being easily approached. Take an interest in your first client's story. Treat his wrong as if it was your own. Inspire him with the confidence that you are not only loyal to him, but also not afraid to speak for him. Confidence in expression is a valuable requirement. Speak to the Court as if you meant what you said. Even if you are defeated.

Your client will give you credit if you fight earnestly and honorably his cause,

which he desires vindicated. The first client comes from some one whom you know, and who has been treated pleasantly by you.

"It might be suggested in connection with this idea, what is your object in entering the Bar as a profession? To make money? If so you might be disappointed. As many of the highest rewards of this life do not go to the lawyer. In fact the opportunity to make money is less than in many another business. Why? 1st because all questionable methods must be avoided by honorable lawyers. In fact his living, his sustenance, are mere incidents to the fulfillment of that highest desire of all good lawyers. The development of the spirit of reason is one's own mind. The vindication of the principles of justice, from every new and changing conditions. To do this work requires the highest order of ability and the scorning of sordid things in life.

"It might be said in this connection, that technicality so misunderstood by laymen, is but the vindication of some well established principle of law; made for the good of human kind. Yet because that principal should come in conflict with some selfish interest of the human heart, it is condemned. An example might be in point. The principle in criminal law, that a venue must be proven in all cases is sometimes overlooked in a \$10.00 petty larceny charge. The criminal is set free because of failure to prove venue, and no one notices it. It is too small a matter to notice. Yet here is a case of a bank failure. A man is tried on the charge of embezzlement—amount \$100,000. The whole city is stirred to the highest point of excitement. A failure to prove venue liberates the criminal. The whole press of the city condemns the law and its technicality. When in truth the error is not due to the law, but on account of its inferior servants who are supposed to administer it correctly.

"This brings to us the point of distinguishing between attorneys at law, and lawyers. The people can no more be fooled. The time has come in the history of the world where knowledge is so generally distributed that a lawyer must know his business if he expects to succeed. In the past

too much confidence was given to the advocate, who with flights of oratory, was expected to blind juries to the true principles of right. To the advocate who it was thought had a stock of tricks which would stifle justice. To-day the ordinary man would have been the extraordinary educated man of yesterday. This fact makes the advocate of to-day logical, and careful not to mistake facts; as false conclusions are too easily discovered, and ridiculed. A natural reaction has resulted. The business lawyer, who is intensely practical, has come to the front. To-day you can name on one hand the noted orators of the bar; yesterday they could not have been counted.

"It might be suggested in this connection that the capacity to illumine a subject will never grow stale.

"Even the business lawyer needs this art; in fact this requirement is a necessity in all lines of business. How many times have you gone into a store and purchased an article that you had no intention of doing, just because the young lady clerk impressed you with the fact that she knew just what wanted. It is well to learn how to express your views forcibly and accurately; this art will stand you in stead all through life. Many a lawyer has lost his case because he was not able to think quickly and state plainly to the court his ideas. What good does it do you to express your ideas when it is too late? You will never get credit for what you know unless you are able to express yourself correctly on all occasions. It might be said in this connection that the work of the literary society is more important than ever.

"What has all this to do with making a client? Do you not realize that people make your clients?

"Then all things that tend to impress people with your ability and reliability are essentials. You know many people, yet you deal with each man separately. It is the manner then that you treat each person that is important. In fact the A, B, C lesson to learn is the manner in which you treat people. Cultivate the acquaintance of men. How many good lawyers are unable to make a living because they are unapproachable? Learn men! Be among men!

Go where men are! Speak upon all occasions. If you are against an assessment, say so, at the meeting of those interested. Those who believe as you do are your friends. Therefore Rule I of my address is to get friends, because they are your first clients, and are the stepping stones of success.

"The natural result of having friends is that friends will bring to you their friends. In other words, the second class of clients are brought to you by your friends. Do not be small then in dealing with your clients, as much of your success depends on being able to have your clients go away pleased. Regulate your fee by the size of the results. Not always by the amount of work done. As people are not always able to understand that feature of the case. Oftentimes it pays to be liberal. When it comes time to settle, say: Well, my friend, how much do you think I ought to charge? He will often say more than you would yourself. Again, in case of a disagreement, split the difference. Say, well you say so much; I feel that it ought to be so much. Now, let us split the difference. This will leave a good taste in the mouth of your client and do much to encourage him to bring others to your office.

"The third class of clients are those who watch your work in the court room. It is not strange that people should watch you while you are doing your work in the court room. It is more or less of an advertisement, and as such should be used legitimately. Are we supposed to live like beetles, and hide our existence from others? Far from it. Assert yourself. Be not afraid to let others see you. Let your work show that you are qualified to call yourself a lawyer; and the fruit of your toil is sure to come.

"The fourth class of clients come from the men you beat. It is often true that the man you beat is your next client, as all desire to succeed.

"Success then brings success. This is more often illustrated in Personal Injury Litigation, a branch of the law that is a very good field for young lawyers. As education upon a good many different subjects is always needed. The directors of large corporations give very little attention to the

trials of young lawyers until judgments one by one are entered against their corporation. Then they ask the question, Who is he? Then the question, Where is he?

"In conclusion, permit me to say, Take part in politics. Do not heed the cry of many concerning the debasement of our politics. There can be no debasement of politics; but there can be a debasement of politicians. For this reason it is all the more necessary for you to do your part to upbuild the State which has done so much for us.

"Again, do not permit success to blind us. Many a prominent young lawyer has had his career cut short because success swelled his head. He forgot the means by which he attained success and scorned the ladder that bore him up. If you tear away the foundation the building must fall. So be diligent and mindful of all your deeds, and never forget the people who are the foundation of your success as lawyers."—*The Law Register.*

In *Butler v. Frontier Telephone Company*, 79 Northeastern Reporter 716, a property owner is by the New York Court of Appeals held entitled to bring ejectment against a telephone company to compel the removal of a telephone wire stretched across his property, though not in any place resting thereon. This decision is based on the settled theory of the law that the ownership of land extends upwards to an indefinite extent, and that the extent of obstruction is only one of degree.

Where an order for the examination of a bankrupt under the provisions of section 21a of the Bankruptcy Act contains a clause ordering him to produce thereon all books and other memoranda used by him in the conduct of his business and he admits that he kept various books in his business which he did not produce and afterwards he does not purge his contempt, it has been held in *Matter of Alper*, 19 Am. B. R. 612, that the court has jurisdiction to make an order to punish him as for contempt and commit him to jail, and that an application for his discharge on habeas corpus will be denied.

In the case of *Dockstader v. Reed*, 106 New York Supplement, 795, a singer contracted with the proprietor of a minstrel troupe to sing for a certain length of time. The contract provided that, in the event of a breach, an injunction might be issued restraining the singer from rendering services for any other person. Before the contract expired, the singer resigned. An injunction was issued, but dissolved on appeal; the New York Supreme Court holding that parties cannot contract that courts will exercise their functions against or in behalf of themselves. Whether a court will so exercise its powers is for the court itself to determine.

In *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Federal Reporter 1, the following conclusions with reference to the right of a foreign corporation were reached: (1) Every corporation empowered to engage in interstate commerce by the state in which it is created may carry on interstate commerce in every state in the Union free of every condition imposed by the latter: (2) Every corporation of each state has the absolute power to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress.

The much noted decision of the trial judge in the Indiana case of *State v. Sopher* that a statute licensing the sale of intoxicating liquors is unconstitutional on the ground that the traffic in such liquors is dangerous and hurtful to society and therefore wrong and cannot be licensed receives a black eye in the decision of the Supreme Court in reviewing this case, *Sopher v. State*, 81 Northeastern Reporter, 913. The court points out that it is only the unrestricted and unregulated traffic in intoxicating liquors which the courts in general have regarded as tending to pernicious or evil results, and that license laws have been generally upheld as valid.

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No. 49.

PITTSBURGH, PA., JUNE 17, 1908.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### MCCULLOUGH-DALZELL CRUCIBLE CO. v. PHILADELPHIA CO.

*Agreement—Duration—Indefinite term—Cancellation.*

The B gas company in consideration of a grant of right of way agreed to supply A with natural gas at certain rates. No time was fixed for the termination of the agreement. Gas was supplied for a number of years when B discontinued the use of the right of way and notified A that it would cancel the agreement. Held, the agreement might be cancelled at any time.

No. 281 July Term, 1907.

Opinion by MILLER, J., specially presiding. Filed February 28, 1908.

The bill alleges that the plaintiff granted the defendant the right to lay and maintain pipe lines in the bed of Thirty-sixth street and Spruce alley in the city of Pittsburgh, title to which the plaintiff claims; in consideration for which the defendant had agreed to furnish gas as fuel to the plaintiff's crucible works free of cost for one year, and thereafter at a rate equal to one-half the cost previously paid for coal, coke and other fuel; that the defendant company now proposes to terminate said contract, to remove the pipe lines remaining and to discontinue service, except upon a new contract based on the present market price; the bill prayed for an injunction and for the specific performance of the contract.

The answer admits the contract, but asserts, first, that it, being without time limit, is revocable upon reasonable notice by either of the parties; second, that the contract itself contains a right of termination; third, that the present condition respecting the cost and supply of gas, was not within the

contemplation of the parties when the contract was made; that the present price is inquitably low, less than the cost of production, and far less than that paid by other consumers of the same character.

#### FINDINGS OF FACT.

1. The plaintiff is a corporation under the laws of Pennsylvania, engaged in the manufacture of crucibles, and other articles containing plumbago; it is the successor of a partnership formerly doing business under the name of McCullough-Dalzell & Company. It is now the owner of a manufacturing plant in the Fifteenth ward of the city of Pittsburgh, bounded by Thirty-sixth street on the east and by the Allegheny Valley Railroad on the south.

2. Prior to the 13th day of March, 1886, Michael McCullough, Jr., a then member of the partnership of McCullough-Dalzell & Company, was the owner of a piece of ground adjoining that described in the first finding of fact, fronting on said Thirty-sixth street, bounded by, and extending across, Spruce alley and said Allegheny Valley Railroad. Said alley had never been an open street, and was owned in fee by said Michael McCullough, Jr., who, with the other members of said partnership, were the then owners in fee of the lot of ground described in the first finding of fact.

3. The Philadelphia Company, defendant, is a corporation under the laws of Pennsylvania, and is engaged now and prior to 1885 in the production, transportation and sale of natural gas in the city of Pittsburgh and elsewhere.

4. On the 13th day of March, 1886, Michael McCullough, of the first part, McCullough-Dalzell and Company, of the second part, and the Philadelphia Company of the third part, entered into the following agreement:

"Whereas, M. McCullough, Jr., is the owner of a certain lot or piece of ground situate in the Fifteenth ward of the city of Pittsburgh, fronting on Thirty-sixth street, and bounded by Spruce alley and the Allegheny Valley R. R.;

And Whereas, Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg and H. E. Dubarry, partners doing business as McCullough, Dalzell & Company, are the owners of a certain lot or piece of ground situate in the said ward, bounded by the Allegheny Valley R. R. on the South and the Alle-



gheny River on the North, and running from 35th to 36th street;

And Whereas, The Philadelphia Company has already laid its pipe line in the bed of that portion of 36th street which is the property of the said McCullough, and McCullough, Dalzell and Company, and also in Spruce alley upon the property of said M. McCullough, Jr., and is desirous of having its right to maintain and operate its said pipe line confirmed;

Now This Agreement made this 13th day of March, 1886, between the said M. McCullough, Jr., party of the first part, Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg and H. E. Dubarry, partners doing business as McCullough, Dalzell & Company, parties of the second part, and the Philadelphia Company, party of the third part, witnesseth as follows:

Said party of the first part, and said parties of the second part in consideration of the sum of one dollar to them in hand paid by the Philadelphia Company, receipt of which is hereby acknowledged, and in further consideration of the agreements hereinafter mentioned to be kept and performed by the said Philadelphia Company, hereby grant and convey unto the said Philadelphia Company, its successors and assigns, the right to maintain and operate and from time to time repair, its pipe line for the conveyance of natural gas, extending from the Allegheny River Southward in the bed of 36th street to Spruce Alley and through Spruce Alley; to have and to hold said right and privilege to the said Philadelphia Company, its successors and assigns forever.

In consideration of the premises, the Philadelphia Company hereby agrees to furnish to the said McCullough, Dalzell & Company or their successors or grantees occupying same ground gas for fuel at their crucible works, of present size and capacity, situate on said property, according to the terms and conditions of the contract in ordinary use by said Philadelphia Company with its customers, but without cost, for one year from the first day of May, 1885 (five), and thereafter at a rate which shall equal one-half the cost to said McCullough, Dalzell & Company of the coal, coke and other fuel by them used prior to the introduction of natural gas (during the two (2) years previous to the introduction of gas).

Witness the hands and seals of the said parties the day and year aforesaid.

All interlineations in above agreement were made prior to affixing signatures.

(Seal: "Philadelphia Company 1883")  
 M. McCULLOUGH, JR.,  
 MICHAEL McCULLOUGH, JR.,  
 JOHN H. DALZELL,  
 C. C. ARENSBERG,  
 H. E. DUBARRY,

PHILADELPHIA Co.,

By CHARLES PAINE,

Vice Pres.

Attest:

J. R. MCGINLEY,  
 Secretary."

To the foregoing agreement and made part thereof was attached a blank form of agreement then in use between the Philadelphia Company and its consumers, which agreement in full as found in the plaintiff's bill marked Exhibit A, is made part of this finding of fact.

Among the provisions of said printed form of agreement are the following: (a) that the consumer should provide and make all connections and appliances for the purpose of utilizing natural gas from the mains of the Philadelphia Company; (b) that it would exercise all due care so as to prevent any waste in the use of gas; (c) that, if it violated said provisions and any of the others contained in the agreement, the supply might be cut off on five days notice.

Among the mutual covenants in said agreement are the following: (a) that if the company's supply of gas should fail, whether from natural causes or otherwise, its obligations under the agreement should cease and determine, and (b) "this agreement shall continue in force after the expiration of the term named until either party gives ——— days notice of the desire to terminate the same, at the expiration of which time the agreement shall cease."

5. On the 9th of April, 1886, Michael McCullough, Jr., party to the agreement set forth in the fourth finding of fact, executed and delivered the following assignment to said McCullough-Dalzell & Company:

"PITTSBURGH, PA., April 9, 1886.

Received of McCullough, Dalzell & Co. one thousand dollars in full of all demands, for privileges granted my grounds, and in consequence of this payment to me, by McC., D. & Co. all benefits arising therefrom to go to McCullough, Dalzell & Co., their grantees or assigns, etc. For further information see McC., D. & Co.'s contract with Phila. Nat. Gas Co. made.

(Signed) M. McCULLOUGH, JR."

6. In pursuance of the foregoing contracts and assignment, the plaintiff company at a considerable expense equipped

and fitted out its plant for the use of natural gas, and the defendant company continued to furnish gas to the plaintiff in accordance with said contracts and assignment, from May 1, 1885, until March 15, 1907, when it served the following notice upon the plaintiff company:

"To the McCullough-Dalzell Crucible Co.,  
Successors to McCullough, Dalzell & Co.,  
36th Street and A. V. Ry., City.

Whereas, by an agreement dated March 13th, 1886, between M. McCullough, Jr., Michael McCullough, John H. Dalzell, C. C. Arensberg, H. E. Dubarry and the Philadelphia Company, there was granted to the said Philadelphia Company, a right of way over which to maintain and operate a pipe line for the conveyance of natural gas, extending from the Allegheny River southward in the bed of 36th Street to Spruce Alley, and through Spruce Alley, and in consideration therefor the Philadelphia Company agreed to furnish to the said McCullough, Dalzell & Company, or their successors, gas for fuel at their crucible works, without cost, for one year from the 1st day of May, 1885, and thereafter at a rate which shall equal one-half the cost to said McCullough, Dalzell & Company of the coal, coke and other fuel by them used prior to the introduction of natural gas (during the two years previous to the introduction of gas); and

Whereas, it is the intention of the said Philadelphia Company to abandon said right of way and to reclaim therefrom as much pipe as it is practicable for it to reclaim, and to be thereupon released from its obligation to furnish gas at the above mentioned rate.

Therefore, Notice is hereby given, that the Philadelphia Company will, on April 30th, 1907, terminate said contract; will permanently abandon and remove said pipe line, and will not thereafter furnish gas to the said McCullough, Dalzell & Company, or McCullough-Dalzell Crucible Company, its successors, except at the present market price and under a new contract.

Witness the seal of the said Philadelphia Company, duly attested, this 15th day of March, A. D. 1907.

PHILADELPHIA COMPANY,  
By J. H. REED, President.

Attest:

W. B. CARSON,  
Secretary.

(Seal: "Philadelphia Company, 1884.")

6. The defendant has a sufficient supply of gas to meet plaintiff's needs, which supply, however, comes from fields and wells

and under circumstances almost wholly different from those in operation and used at the time the contract was made, and which will be fully set forth in another finding of fact. The defendant can supply the plaintiff's needs from its mains located in the public streets, without using any of the lands or easements formerly belonging to Michael McCullough, Jr., or to the plaintiff's predecessors in title.

7. When said contract, Exhibit A, was executed, defendant's supply of gas was obtained from wells in and near the vicinity of Pittsburgh, the gas being driven by natural pressure. At present about 80,000 cubic feet of gas per day comes from the wells or territory in use when the contract was executed. The defendant's main supply is now obtained from wells at a great distance from the city of Pittsburgh, driven to far greater depth, and the greater portion of the gas must be pumped from the supply wells through its mains to the points of distribution. The cost of production is now a fraction over nine cents per thousand cubic feet. The defendant's regular charge to like consumers at present is 25 cents per thousand for the first 150,000 cubic feet, 15 cents per thousand for the next 150,000 feet and 11 cents per thousand for all in excess of that. The plaintiff company from the time of the contract to 1893 paid the defendant \$114 or \$117 per month, and since that time it has paid \$50 per month. From a meter installed by the defendant, it appears that between the 4th of May, 1907, and the 31st of December, 1906, a period of about eight months, the plaintiff company consumed 24,072,400 cubic feet of gas, or an average of over 3,000,000 cubic feet per month, which at the ordinary charge to like consumers would average over \$350 per month. Its daily consumption is over 100,000 cubic feet and exceeds the daily production of all the wells and territory when the contract was made.

#### CONCLUSIONS OF LAW.

1. The written contract, Exhibit A, exclusive of the form of printed contract attached thereto, being unlimited as to time, is revocable by either of the parties upon reasonable notice.

2. The printed form of contract made

part of Exhibit A, containing the terms and conditions not expressed in the written portion of the contract, provides for the termination of the contract by either party on reasonable notice.

3. The conditions relative to the cost and supply of gas now existing, were not within the contemplation of the parties when the contract was made. If at the time the contract was made the parties had not in contemplation the addition of new territory and additional wells to supply the demand, the contract is terminable by reason of the failure of the then supply.

4. If at the time the contract was made the parties had in contemplation the exhaustion of the then gas supply and the necessity of increased expenditures to obtain a new supply, then the contract was a discrimination as against other consumers of a like character, and is void on the grounds of public policy.

5. The defendant, having tendered a reconveyance of the easement granted to it and given notice of its intention to terminate the contract, under the facts and foregoing conclusions, should not be held in equity to a continued further performance of said contract.

6. The bill should be dismissed at the cost of the plaintiff.

#### OPINION.

It is clear from the opinion of the late President Judge Ewing of this court in *Crescent Steel Company v. Equitable Gas Company*, 40 P. L. J. 316, that whatever else may not have been in the contract of April 2, 1889, the supply of gas for an indefinite period was therein, and in its continuation by the contract of November 1, 1889. Having this in mind, he states that either party might terminate the arrangement on giving a reasonable notice of its intention so to do.

The general principle that contracts without time limit are terminable on reasonable notice by either of the parties is sustained in *Coffin v. Landis*, 46 Pa. 426, where the question at issue was, whether such revocation constituted a breach. The conceded right of a principal to revoke an agent's authority was only incidental to the main question. There certainly is no question of agency in the case of *Philadelphia & Reading Railroad*

*Company v. River Front Railroad Company*, 168 Pa. 357, where it is specifically held that the contract was not irrevocable by either party upon suitable notice, after a date named. So in *Cumberland Valley Railroad Company v. Gettysburg & Harrisburg Railroad Company*, 177 Pa. 519; and in *Kenderline Fuel Company v. Plumb*, 182 Pa. 463, the court, after stating the facts, concludes "if either party desired to terminate it, if this could not be done by agreement, it was his duty to deal fairly by the other party and to give a reasonable notice of his intention to withdraw from it at a fixed date."

The foregoing principle finds universal application in the decisions of many of the other states, among which are: *Marble v. Standard Oil Company*, 169 Mass. 353; *Irish v. Dean*, 39 Wis. 662; *Savage v. Surgical Association*, 50 Mich. 400; in *Echols v. Railroad Company*, 52 Miss. 610, a contract to supply cord-wood to a railroad company, without fixing a time for its termination, the court said: "Perpetual contracts of this character will not be tolerated by the law, or rather will not be enforced, as imposing an eternal and never-ending burden. An agreement to furnish a particular commodity at a specified price . . . without specification as to time, will be construed either as terminable at pleasure, or implying that the thing to be done shall be performed within a reasonable time . . . any other theory is a moral and a practical impossibility and if indulged in by the courts could not be enforced in the ordinary concerns of life," citing a number of authorities, among which are *Chitty on Contracts*, 11th Am. Ed. 1062; *Story on Contracts*, section 21.

In *Marshall v. The Railway Company*, 136 U. S. 393, where the city of Marshall gave to the company \$300,000 in county bonds and 66 acres of land within the city limits in consideration that the company would permanently establish its eastern terminus and maintain therein its main machine shops and car-works, it was held that the contract was performed when the company had complied with the provisions thereof for a period of eight years until its interests and the public demand required removal of the subjects of the contract to some other place.

The case of *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, relied on by the plaintiff, was decided on its own peculiar facts, among which it appears that the defendants had released a prior valuable contract; that they had expended \$10,000 to erect a new wire under the new contract; and that plaintiff failed to substantiate its averment that it was excluded from any use of the wire on its lines by the continuous use thereof through the defendants; these facts seeming to establish an equity in favor of the defendants, are not comparable with those in the case at bar, and therefore have no controlling weight in its determination.

The contract, Exhibit A, as a whole, is revocable on notice by its terms. The printed form contains the "terms and conditions" referred to in the written contract; in consideration of the grant of an easement in the beds of Thirty-sixth street and Spruce alley, the defendant company agreed to furnish gas to the works for nothing during the first year, and thereafter at half the cost of coal and coke, "according to the terms and conditions of the contract in ordinary use by the said Philadelphia Company with its customers." The printed contract contains important and material terms and conditions, without which the written contract was not enforceable. For instance, the plaintiffs were required to make all connections and appliances from the defendant lines; to exercise due care in preventing waste, agreeing that, if it violated any of the foregoing provisions, or any of the other provisions in said printed form, the supply of gas might be cut off; it contains the important provision that in case the supply of gas failed the contract was at an end, and the final clause that the contract might be terminated upon certain notice; these are there with a purpose, else they would have been stricken out. If the printed contract is not to be considered with the written, why is it part thereof?

It is urged that it is inconceivable that the parties by the written terms of the contract should have provided for a never-ending agreement and at the same time provide for the termination thereof. That does not follow—when the contract was made, much of the consideration had passed—the defend-

ant was on the right of way—the plaintiff receiving free gas—under the conditions then existing, its continuation for a reasonable time controlled. By their act they provided for its termination under changed conditions.

It is contended that defendants having accepted this right of way by deed, cannot be permitted to retain the same and escape the liability to deliver gas at the stipulated price, citing a number of railroad condemnation proceedings as analogous cases: these are all actions at law, where the injury, if any, was ascertainable in damages. If the use of this right of way has damaged the freehold to an extent exceeding the difference between the price they paid and the price charged to other consumers, then it is within plaintiff's right to bring suit for the recovery of such additional loss.

Not only is it said in *Crescent Steel Company v. Equitable Gas Company*, supra, that the parties might terminate their contract, but the principle is further announced that the contract was in violation of the act of assembly chartering natural gas companies, and void as contrary to public policy, because it was an attempt to prefer certain consumers as against others of a similar class. Conceding that the preferred consumers there, were stockholders and directors of the gas company, why in principle should there be any distinction between them and any other class of preferred consumers, peculiarly benefitting by a contract with a public service corporation, necessarily at the expense of other consumers? This contract must be construed with reference to the conditions existing at the time it was made. If, as contended for by the plaintiff, at the time of its execution all the parties knew or ought to have known that new fields and greatly increased expenses would be incurred for the purpose of the supply of gas, then the contract was discriminatory and is void because the defendant, to remain in business, must charge other consumers more than the cost price of its gas; this advantage to the plaintiffs, against the general public, is wholly unwarranted in law. The day of rebates, preferential discriminations, and unequal and unfair charges, to like classes of customers, by public service cor-

porations, is, and should be, drawing to a close.

Again, if the parties had in contemplation only the conditions as they then existed, it is clear that the contract should fail for want of a supply of gas, the evidence being that not enough gas is obtained from all the wells in existence when the contract was made to now supply the plaintiff's works, if no other consumer was served in the city of Pittsburgh or its vicinity. The subject-matter, the supply of gas, being thus exhausted, the contract is terminable by virtue of the terms and conditions relating thereto: *Ward v. Vance*, 93 Pa. 499.

Finally, the equities of this case are wholly with the defendant company. It is clear that when this contract was made a condition existed vastly different from that now found. The supply of gas seemed over-abundant; it came from the immediate vicinity, propelled by its own power. For twenty-two years and more the plaintiffs have had a great profit at the expense of the general consumer, and loss of the company, paying for this fuel now a little over ten per cent of its actual cost. Since 1893, a period of fourteen years, this advantage amounts to more than \$65,000; from 1885 to 1893, a period of eight years, it had the same relative advantage. Apparently the consideration of this right of way has been an expensive one. Certainly, in view of the abandonment thereof with the tender of surrender, the plaintiffs have no ground for complaint, especially in view of the fact that the offer is made them to continue their supply on such new contract as may be agreed upon, assuming of course that this contract will be fair and on the same terms and conditions of like contracts with a like class of consumers.

For plaintiffs, *Patterson, Sterrett & Acheson*.  
For defendant, *Reed, Smith, Shaw & Beal*.

(Common Pleas No. 2, Allegheny Co.)

### TURNER v. McCRACKEN.

*Agreement—Equity—Specific performance.*

▲ transferred to B a leasehold and received from B a lease of part of the premises, and an agreement providing for the care of horses, use of

water and gas, use of furnace and other matters, each party conducting a separate business on the premises. Upon a bill in equity by A asking a mandatory injunction to carry out the provisions of the lease and agreement the court held A was entitled to a decree providing for carrying out the lease and the use by A of the portion of the premises to which she was entitled and the proper measuring of the cost of gas and water used by each.

The court had no jurisdiction to decree the carrying out of the agreement as to care of horses and other such matters.

No. 73 April Term, 1908. In Equity.

Opinion by SHAFER, J. Filed June 6, 1908.

The bill is for a mandatory injunction to require defendant to carry out a certain contract and to restrain him from interfering with certain water and gas pipes and from using a certain name in his business.

#### FINDINGS OF FACT.

1. In February, 1893, one Thomas D. Turner acquired an estate on a certain lot in Wilkensburg, Allegheny county, for twenty years and built thereon a building adapted for the livery and undertaking business in which he was engaged, which business he carried on on the premises until his death in 1905, under the name of "Thomas D. Turner, Funeral Director and Livery."

2. Under the will of Thomas D. Turner, Eliza J. Turner, the plaintiff herein, became owner of the premises and the business carried on therein. On February 7, 1905, she entered into an agreement with one G. A. McKean, a copy of which agreement is Exhibit A of the bill, and at the same time took from him another paper in the form of a lease, which is Exhibit B of the bill.

3. The contract formed by these two papers between the plaintiff and McKean was in substance that she transferred to McKean the leasehold and building and the livery business of her late husband for a certain sum of money. She was to retain the undertaking business and McKean leased to her so much of the premises "as may be necessary and convenient for the conduct of the undertaking business, including office room, room for two horses, one casket wagon, two small wagons, one buggy, one rockaway, together with the

necessary harness and stalls for four horses, and room inside the building for caskets, chairs, trimmings, etc.," free of rent, and she agreed to hire carriages from McKean for funerals conducted by her during the continuance of the term, in preference to other livery men, and McKean agreed to supply her with carriages, and each party is to do what they can to promote the interests of the other in their respective businesses. The agreement, Exhibit A, contains a clause by which McKean agrees to lease to Mrs. Turner so much of the premises, etc., as described in the lease, except that the agreement says, "stalls and feed for four horses" instead of stalls for four horses as stated in the lease, and the agreement is that Mrs. Turner is to pay for the boarding of said four horses at \$75 a month.

4. McKean entered into possession of the livery business and continued in possession and continued to operate the same for some months, when he sold all his interest to the defendant, John A. McCracken, who entered into possession of the livery business about May, 1907.

It does not appear what name McKean carried on the business or whether he used any special name, except that it does appear that a number of cards were issued by him with the name, "Turner Livery, G. A. McKean, Proprietor" printed therein. The defendant, McCracken, used from the time of his taking possession of the business the name "Turner Livery Company" and still conducts his business under that name. This was done with the knowledge of the plaintiff, or at least of her agent in charge of her business conducted in the same building, and no objection was made so far as appears until after the present controversy arose. It was shown in evidence that in the telephone book the business of the defendant is entered as "Turner Livery Company," and that of the plaintiff as "T. D. Turner, Funeral Director and Livery." Some degree of confusion has arisen with regard to the business in the delivery of mail, telegrams, etc., by reason of the use of the name Turner by the defendant.

5. When the possession of the building was divided between Mrs. Turner and McKean upon the sale of the livery business to

him, there was but one water meter to measure the water used by both parties, but one gas meter for the natural gas, and the rooms of the plaintiff were heated, in part at least, by a hot-air furnace placed in the cellar under the rooms, which cellar belonged to the McKean part of the building and was used by him in connection with his livery business, except so far as to give room for the furnace and necessary fuel for defendant.

6. Some time in the fall of 1907, when plaintiff undertook to put in repair and use the hot-air furnace above mentioned, the connections of which had been damaged to some extent by fire in the premises, the defendant refused to allow her to do so, and took away the cold-air pipe connected with the furnace and other parts of it so that it could not be used, on the claim, as we understand it, that she had no right to retain it, and besides that it was dangerous to the building. Upon application for a preliminary injunction, the defendant was enjoined from interfering with the plaintiff in this respect, and she has since put the furnace in good order at an expense of \$34.80, all of which, so far as appears, was made necessary by the acts of the defendant.

7. The contract having failed to provide as to how payment of the gas and water used in the respective parts of the building should be made, and a dispute having arisen in regard to this, the defendant, about the same time, turned or cut off the water and removed some gas pipe which cut off the supply of gas from the part of the premises belonging to the plaintiff. On hearing for a preliminary injunction, the plaintiff was directed to make whatever repairs were necessary to connect the water with her premises and the defendant should then turn on the water, and that the defendant should pay for the water used by her at a certain rate per quarter until final hearing; and it was also ordered that an additional gas meter should be put in so that all gas used by the plaintiff should pass through her own meter, the question of who was liable for this expense and for the additional meter being reserved for final hearing. The expense of putting in a new gas meter, which was paid by the plaintiff, was \$15.20. No

additional water meter has yet been put in, and it appears from the evidence that the water company which furnishes the water declines to put two meters in one house. The water used by each of the parties can be as readily ascertained by putting an additional meter upon the water pipe leading into the plaintiff's part of the premises between those premises and the meter of the water company.

8. A further dispute as to the meaning of the contract arose between the parties as to the meaning of the expression "boarding of said four horses." The defendant contends that all he is bound to do in regard to the horses is to furnish stalls in which to keep them and feed which the plaintiff's servants may give them or not as they like, and that he has nothing to do with hitching or unhitching the horses, taking care of the harness or washing the vehicles in which the horses are to be used, or furnishing the water with which they are to be washed. The plaintiff, on the other hand, contends that the meaning of the agreement is that the defendant is bound to hitch and unhitch the horses, take care of the harness and wash one vehicle for each horse, and feed and care for the horses generally. It is admitted that it was not the intention that McKean should take care of the hearse and casket-wagon or the harness connected therewith.

9. It does not very definitely appear what McKean did upon entering in possession; but it seems from the evidence that the hitching and unhitching of the horses and the feeding of them was done sometimes by the employees of one and sometimes by the other, as appeared most convenient, and that the four vehicles last mentioned in the lease were in fact washed by the employees of McKean and also of McCracken for a considerable time after he went into possession, although they say that this was done without their knowledge. Some evidence was offered on each side as to the meaning of the word "board" when used of horses, and from this evidence it would appear that the boarding of a horse in the absence of any other arrangement would ordinarily mean the doing and furnishing of everything necessary to take care of a horse and the vehicle

in which he was used. It also appears that the rate of \$75 for four horses is somewhat under the usual rate for boarding. It also appears that the meaning of the word "boarding" might be different in a case where the owner of a horse was understood to have employees to take care of the horse or not.

#### CONCLUSIONS OF LAW.

1. Under the agreement between the parties, the plaintiff is entitled to maintain the furnace in question and to the use of so much of the cellar under the premises containing the furnace as is necessary and convenient for its proper operation, and the defendant had no right to remove the same and is liable to the plaintiff for the damage caused thereby, amounting as above stated to \$34.80.

2. We do not understand the contract between the parties to provide that the defendant should furnish water or gas to the premises occupied by the plaintiff without compensation, but understand the contract to imply that each party is to pay its proper proportion of the cost. As to the gas, this matter has already been adjusted by the installation of a second meter, so that each party pays the gas company for the gas used by it. As to the measuring of the water used by each, the proper solution of the difficulty would seem to be that an extra meter should be put upon the line to measure the water going into the premises of the plaintiff after passing through the meter now on the premises and that each party should pay the proportion of the whole cost of water used by each. We are of the opinion that the court has no power to order such an arrangement to be made. We have power, however, to provide that the relief sought for by the plaintiff should be granted upon equitable terms, and that the defendant ought to be allowed to relieve himself from the uncertainty of his contract with the plaintiff in regard to water by the installation of a meter as stated, if he desires to do so, the expense of the installation to be divided equally between the parties.

3. As to the use of the name Turner Livery Company by the defendant, we are of the opinion that the original contract between the plaintiff and McKean did not

authorize McKean to carry on business under the name of Turner or to use that name in connection with the business as the defendant claims; but it seems to us that as the defendant immediately upon his purchase of the premises used the name Turner Livery Company to the knowledge of the plaintiff and without objection by her, and has been conducting and building up the business in that name for a considerable time before any objection was made, it would not now be equitable to require them to cease using the name.

4. As to the right of the plaintiff to have the defendant hitch and unhitch her horses, wash her vehicles, etc., which she claims to be included under the term, "boarding for four horses," we are of the opinion that that is not a matter to be determined in this proceeding, nor a contract of which specific performance can be decreed. It is not alleged that the plaintiff cannot procure someone to hitch and unhitch the horses, wash the vehicles, etc., nor that any irreparable injury will be suffered by her if these things are not done by the defendant. If he has failed, or continues to fail to do in this respect what the bargain calls for, and she is compelled to do it for him, he will be liable to her at law for the amount of the injury suffered by her, and this remedy will be adequate and complete. We are, therefore, of the opinion that the plaintiff is not entitled to any relief in this form of proceeding, but that she should be left with respect to it to her remedy at law.

5. The plaintiff is therefore entitled to a decree enjoining the defendant from interfering with her maintenance of the furnace in question as it now exists, and from interfering with the flow of gas and water through the pipes now in place in the building, provided that if the defendant shall within three months install a water meter on the line from his present meter to the premises of the plaintiff, such as used by the water company now furnishing the water, this injunction in regard to the water and water pipes shall not continue in force thereafter, unless the plaintiff shall pay to the defendant one-half the proper cost of the installation of said meter within a reasonable time after its installation and thereafter pay such

proportion of the water rent of the premises as shall be indicated by such meter as the proportion to be paid by her, and that the defendant pay to the plaintiff the sum of \$34.80, the cost of putting in order the furnace above mentioned, and \$7.60, the one-half expense of putting in the gas meter, and that the defendant pay the costs.

For plaintiff, *Brown & Stewart*.

For defendant, *Lunfit & McIntosh*.

(Common Pleas No. 2, Allegheny Co.)

### WILLOCK v. KAUFMANN.

*Exchange of real estate—Agreement—Signature of one party only—Equity—Specific performance.*

An action to compel specific performance of an agreement to exchange real estate, based upon a contract, which the defendant signed with the understanding that the plaintiff's name should be added on the following day, but which was not signed by him until almost two weeks thereafter, the binding effect of which defendant denied as soon as he heard of it, will be dismissed.

No. 27 January Term, 1908.

Opinion by FRAZER, P. J. Filed February 24, 1908.

This bill was filed to compel specific performance of a contract for the sale of real estate. From the bill, answer and proofs, we find the following facts:

#### FINDINGS OF FACT.

1. On July 31, 1907, plaintiff was the owner of a lot of ground situate on Liberty avenue, Tenth ward, Pittsburgh, and defendant, the owner of lot situate on the south side of Fifth avenue, Sixth ward, Pittsburgh, both of which properties are fully described in plaintiff's bill.

2. After negotiations, plaintiff and defendant reached an agreement for the exchange of their properties, the terms and conditions of the exchange being set forth in a contract in writing, a copy of which is attached to plaintiff's bill and marked "Exhibit A." In the negotiations leading up to the agreement to exchange the properties, C. C. Hamilton, a real estate agent, represented both parties as broker.

3. The agreement referred to in the



preceding finding of fact was prepared by defendant's attorney and signed by defendant at his place of business in this city and delivered to Hamilton with instructions to obtain the signature of plaintiff to the paper and return it to defendant during the following day, August 1st. The time for obtaining plaintiff's signature was, however, at the request of Hamilton, extended by defendant until August 3rd.

4. On the evening of Saturday, August 3rd, Hamilton and defendant had a conversation over the telephone in reference to the exchange of properties now in controversy. While there is a conflict in the testimony as to the effect of that talk, the weight of the evidence is to the effect that defendant was advised that plaintiff would not sign the agreement in its present shape, and that the "deal was off," to which defendant replied that he was satisfied.

5. On Monday, August 5th, defendant by telephone left word with the stenographer in Hamilton's office to have the agreement to which his signature was attached returned to him at once. In answer to his request, he was informed by the stenographer that Mr. Hamilton was in Atlantic City, and that the agreement was not at the office.

6. Although the agreement signed by defendant was presented to plaintiff on July 31st, 1907, plaintiff's signature was not attached to it until August 13th, and on August 15th or 16th it was taken to the place of business of defendant by Hamilton and in defendant's absence given to his son. Defendant upon his return home refused to accept or acknowledge the contract and has continued to deny that it is binding upon him.

7. At the time these negotiations were pending between plaintiff and defendant, plaintiff was negotiating with Young for the sale to him of the Kaufmann property. Plaintiff's signature was not attached to the agreement, Exhibit A, until after Young had agreed to purchase the property from him. If the sale had not been made to Young, plaintiff would not have signed the agreement. Defendant was not aware of plaintiff's negotiations with Young until sometime after August 16, 1907.

8. On October 1, 1907, plaintiff tendered

to defendant a deed for his Liberty avenue property and demanded a deed from defendant for his Fifth avenue lot. Defendant thereupon repeated his denial of the validity of the agreement and refused to make the exchange.

#### CONCLUSIONS OF LAW.

The main question in this case is whether or not the parties reached an agreement for the exchange of their properties which was binding upon them. That defendant was willing to make the exchange, is made plain by his execution of the contract. His signing, however, did not complete the transaction and render the agreement binding upon him indefinitely or until plaintiff should ascertain whether he could obtain a purchaser for the property. The evidence clearly shows that when defendant attached his signature, it was with the understanding that plaintiff's name should be attached the following day, or not later than Saturday, August 3rd. That condition defendant had a right to impose, and when plaintiff failed to comply with it, defendant was absolved from all further liability unless he should further extend the time, which he did not do. That the negotiations were terminated on the evening of August 3rd is clearly shown by the testimony. Consequently plaintiff's subsequent signing of the agreement amounted to nothing, especially is this so when it appears that his signing depended upon his ability to secure a purchaser for the property, and that he did not sign until he found a person ready to buy.

Let a decree be drawn dismissing the bill at plaintiff's costs.

For plaintiff, *Benj. L. Hirshfield* and *J. E. O'Donnell*.

For defendant, *Joseph Stadtfeld*.

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In *Hinman v. Clarke*, 105 New York Supplement, 725, the Appellate Division of the New York Supreme Court holds that, in the absence of a general legislative restriction by ordinance or otherwise, an owner of the building in a city has a common-law right to the reasonable use of the city streets for the purpose of moving such building from one location to another. Such right is, however, subject to legislative restriction.

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No. 50.

PITTSBURGH, PA., JUNE 24, 1908.

## Court of Common Pleas No. 1, ALLEGHENY COUNTY.

### SAMMONS v. SAMMONS DECORATING CO.

#### Receiver—Account—Distribution—Landlord's priority.

In the distribution of funds in the hands of a receiver, arising from the sale of goods on the demised premises, held, reversing the auditor, that the landlord's claim for rent, within the year preceding the date of the receiver's appointment, was entitled to priority over certain administration expenses referred to in the opinion of the court.

No. 407 March Term, 1905. In re exceptions to auditor's report.

Opinion by BROWN, P. J. Filed June 17, 1908.

This matter arises upon exceptions filed by James M. Giles, landlord, to the auditor's distribution of the balance, \$88.88, in the hands of the receiver. He distributed the fund:

To the Mercantile Trust Co., premium on receiver's bond.....	\$12.50
C. R. Peregrine, bookkeeper for the receiver	60.00
James M. Giles, on account.....	16.38
	<hr/>
	\$88.88

The landlord's claim was for \$600 rent accruing within the year preceding the receiver's appointment; and his contention is that the balance, \$88.88, should have been distributed to him. His contention is well founded.

By the appointment of the receiver, the assets upon the demised premises passed to the custody of the law—the law's possession (in the nature of an equitable execution) bearing the impress of the landlord's right of distress under the act of June 16, 1836.

By analogy the case is ruled by *Longstreth v. Pennock*, 87 U. S. 575. The reporter's history of the case is as follows:

"Pennock rented a warehouse in Philadelphia to Wattson and DeYoung, at the yearly rent of \$4500, payable in equal quarterly installments. Wattson & DeYoung, the lessees, being in possession of the premises, and having therein a stock of goods more than sufficient to pay the rent if a distress had been made, were adjudicated bankrupts, and Longstreth, their assignee, took possession of the premises, and of the stock upon them. The landlord claimed of him the rent due and accrued up to the date of the issuing of the warrant in bankruptcy, and it having been paid to him under a stipulation to restore the same if the assignee were not allowed credit therefor on the settlement of his account, and he not having been allowed such credit, this action was brought by him to test his right to get back what had been so paid for rent accruing prior to the warrant, which was for much less than a year's rent. The Circuit Court adjudged that the payment was rightfully made, and that the assignee could not recover it back."

Mr. Justice Swayne, delivering the opinion of the court, says:

"The assignee acquired his title to the movable property found on the demised premises, subject to the rights of all other persons. The rent in question was for a period which terminated when the assignee took possession, and the entire period was within a year of that time. Before the commencement of the proceedings in bankruptcy, the defendant in error might have distrained; and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania, of June 16th, 1836, provides that where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year shall be paid first out of the proceeds of the sale. This case is within the equity of that statute."

In *Lane v. Washington Hotel Co.*, 190 Pa. 230, the sole question before the court was, whether rent accruing during the receiver's possession of the premises was entitled to priority in the distribution of the proceeds of sale of goods upon the premises? Held, that it was—and over large administration expenses.

The same rule of priority governs as to rent due at the time of the receiver's appointment—the landlord's right of distress and priority (in the nature of an equitable lien) following the goods on the premises

and their proceeds in the hands of the receiver.

*Fox v. Singerley*, 75 Pa. 112, is not in conflict with this ruling. The action was by Fox (receiver) to recover the price of property purchased by Singerley at a receiver's sale of goods on the demised premises. Held, that Singerley's claim for rent was not a set-off. Of course, it was not—for the sole relation of the parties to the subject matter of the action was that of seller and purchaser. The landlord's rights in a distribution of funds in the hands of the receiver were not an issue in the case.

Exceptions sustained — and balance (\$88.88) in the receiver's hands directed to be paid to the landlord.

For exceptant, *Wise & Minor*.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

### IRON CITY HEATING COMPANY v. KAUFMANN BROTHERS.

*Mechanics' liens—Notice of lien—Contents—  
Act of June 4, 1901, section 8.*

It is sufficient if plaintiff substantially complies with the eighth section of the mechanics' lien law of 1901, which requires notice to be given to the owner of an intention to file a lien.

A notice is sufficient which names the contractor and the work to be done and gives an itemized statement of the amount due, the kind of labor and materials furnished and the dates when furnished.

No. 831 July Term, 1905. Sur motion and reasons ex parte defendant for a new trial and judgment for defendant non obstante verdicto.

Opinion by FRAZER, P. J. Filed January 29, 1908.

The sci. fa. in this case was issued upon a mechanics lien filed at No. 14 July Term, 1905, and was for labor done and material furnished by plaintiff as sub-contractor to C. H. Bradley, Jr., & Company, general contractors, for furnishing and erecting boilers in the large store building of defendants at the corner of Fifth avenue and Smithfield street in this city. At the trial a verdict was rendered in favor of plaintiff.

This motion for a new trial is based upon our refusal to affirm defendant's sixth point, which was as follows: "The notice of intention to file this claim does not comply with the statutory requirements, and your verdict should therefore be for defendants."

Section eight of the act of June 4, 1901, P. L. 434, provides, inter alia, as follows:

"Any sub-contractor intending to file a claim must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims the amount alleged to be still due and how made up, the kind of labor or material furnished and the date when the last work was done or materials furnished."

The object of the notice required by the act "is to inform the owner of the demand and the nature thereof in order that he may require payment by the contractor, or, in default thereof, withhold the amount from the contract price." *Thirsk v. Evans*, 211 Pa. 245. While the notice in this case is not a literal compliance with the act, it is at least a substantial compliance with its terms and fulfills its intention, as laid down by Mr. Justice Elkin in *Thirsk v. Evans*, supra. The notice sets forth that the plaintiff is a sub-contractor, and that the contract under which it claims is a contract "with C. H. Bradley, Jr., & Company, the contractors, for furnishing and erecting boilers in said Kaufmann building." It also specifies the amount still due and contains an itemized statement of the kind of labor and materials furnished and the dates when furnished. This, it seems to us, is a sufficient notice when tested by *American Car Company v. Alexander Water Company*, 215 Pa. 520. In that case Mr. Justice Potter holds that if the notice is a substantial compliance with the act it is sufficient. In *Este v. Pennsylvania Railroad Company*, 27 Superior Court 525, in discussing the sufficiency of a notice by a sub-contractor of an intention to file a lien, the court says:

"The object of the notice is to protect the owner from making payments to the contractor when his property is liable to be subjected to a lien. It should be sufficiently definite to enable the owner to ascertain the amount of the claim, its date, and the nature and amount of the labor and material

out of which it arises. These requirements are met in this case. The notice gives the facts necessary to enable the owner and the contractors to identify the claim in all its particulars, and to discover that it is based upon orders of the plaintiff out of which a liability by contract arises against the contractors. It was apparently not the legislative purpose to require the same exactness of form in the notice that is required in the lien, and the notice in question meets all the substantial requirements of the statute."

Upon careful examination of the notice given in this case, we are of opinion that it is at least a substantial compliance with the act, and sufficiently informs the owners of the building of the kind of labor and material included in the claim and the contract under which the same were furnished. Defendants' sixth point was, therefore, properly refused.

And now, January 29, 1908, new trial refused and the rule for judgment non obstante veredicto is discharged.

For plaintiff, *Watterson & Reid*.

For defendant, *J. Rodgers McCreery*.

## Court of Quarter Sessions,

WASHINGTON COUNTY.

### COMMONWEALTH v. MASON.

*Liquors—License—Sale without license—Conviction.*

The steward of a club ordered a certain number of kegs of beer from the defendant, an individual, and paid him in part therefor. The defendant purchased the beer from a brewery in Steubenville, Ohio, had it consigned to himself, paid the freight, took it from the cars and delivered it at the club. Defendant was not a licensed dealer. Held, that this was a selling without a license and the defendant was properly convicted.

After the commonwealth had proved these facts the burden was upon the defendant to prove the ownership of a license and the right to sell at the place where the sale took place or that he acted as the agent of someone who had a license or as the agent of the club.

No. 180 May Sessions, 1908. Selling liquor without license. Motion to lift sentence and for a new trial.

Opinion by McILVAINE, P. J. Filed June 1, 1908.

#### STATEMENT OF FACTS.

The facts in this case were undisputed in so far as they were material in determining the issue raised by the defendant's plea of not guilty. The only dispute between the commonwealth and the defendant was as to the proper inferences to be drawn from these undisputed facts.

There is a club at Primrose in this county, the character and membership of which was not revealed by the testimony. All we learned of it was that its name is "The Solidarite" and that it has a hall where beer is at intervals kept for the use of its members. The defendant on the 3rd day of March, 1908, was given \$45 by the steward of this club whose business it was to see that the club was supplied with liquors when wanted, and requested that the beer be delivered at the club room or hall. He requested that it be delivered on a certain day and the amount ordered was 54 kegs. When this order was given the steward informed the defendant that the committee "would like to have, or wanted to try, 'Steubenville beer' this time." Previous, to this time the defendant as agent of the Washington brewery had been delivering its beer to the club and had in his possession a delivery wagon of that brewery at the time named, in which he hauled beer from the railroad station to which the brewery company shipped the beer, to those whose agent had ordered it. When the 54 kegs of beer arrived by rail at the railroad station, it was consigned to the defendant, Frank Mason, and he paid the freight and delivered it to the club or its hall in the wagon of the Washington brewery, which was in his possession. The railroad agent at the station testified that the 54 kegs came in a freight car piled up in one end of the car and that he noticed a card on the end of at least five or six of the kegs, on which was written the name "Frank Mason," but that he did not notice what, if anything, was on the other kegs. The exact price of the 54 kegs of beer was not stated by any of the witnesses, but it was testified that there was a balance to be paid on the beer after having received the \$45 on account,

and that this balance of the bill was afterwards paid by the club to the defendant. There was proof that the defendant was known as a beer agent and had ordered and shipped to him other beer for other persons, and on the stand he himself designated the persons to whom he delivered beer as "his customers." There was no testimony submitted at the trial showing that the "Solidarite club," or any one for it ordered the 54 kegs of beer from any persons or brewery in Steubenville, Ohio, the order to be filled for it in Ohio and shipped to it at Primrose. The representative of the club simply told the defendant that the club wanted 54 kegs of beer on March 5th and that the committee had said that they wanted Steubenville beer, and when the order was given he advanced the \$45 to the defendant as part payment of the bill for which the defendant gave a receipt in which it was noted that the \$45 was paid in advance and that the beer was to be delivered on March 5th.

The counsel for the defendant did not at the trial controvert the facts proven by the commonwealth, but insisted first that the dealing by the defendant with the club was a single transaction and that the fair inference was that he was the agent of the club in ordering this beer and that he did not sell beer to the club, and second that the Washington brewery had caused to be instituted this prosecution against the defendant, their former agent, because he had ordered Steubenville beer for the club, thus interfering with its trade. We instructed the jury that if they believed that the defendant as a matter of accommodation simply forwarded the club's money to a brewery company in Steubenville, Ohio, designated by the club, with the request that 54 kegs of beer be shipped to it, then there would be no sale of beer by the defendant to the club and they could acquit the defendant, but that in our opinion the undisputed facts showed a sale and if the jury so found it would be their duty to convict. We did not give the jury binding instructions to convict, but we did refuse to instruct them to acquit and also said that the undisputed testimony was sufficient to support a verdict of guilty if believed. We also said in the presence of the jury that the fact that the Washington

Brewery Company may have instituted this prosecution to prevent competition, would not be a just or legal ground for acquitting the defendant.

The defendant was convicted, and immediately, on motion of the district attorney, sentenced, and on the second day after the sentence was imposed the defendant by his counsel made the motion now before us, to lift the sentence and grant the defendant a new trial, on the ground that the court erred on the one hand in not instructing the jury that the evidence was insufficient to warrant and support a verdict of guilty, and on the other hand erred in instructing the jury that if they believed the undisputed testimony in the case, it was sufficient to support a verdict of guilty, and their verdict should be guilty.

#### OPINION.

There is no doubt about the fact that the "Solidarite Club" obtained 54 kegs of beer on March 5, 1908, from the defendant, for which they paid him, and that the beer came to Primrose railroad station consigned to the defendant; that he paid the railroad company the freight, took possession of the beer as consignee and afterwards delivered it to the club at their hall. This transaction without explanation constitutes a sale, and the defendant was prima facie guilty of selling beer without having obtained a license to do so. The burden was on him, when the commonwealth rested its case, to show that he had a license or that in the transaction he had acted as the agent of some one who had a license, or that he acted throughout the transaction as the agent of the club in purchasing the beer.

There is no claim that the defendant had a license nor was there any testimony offered to show that he was acting for some one or some company that had a license. Indeed, there was no evidence to show whose beer it was that was shipped to the defendant. It was designated simply as "Steubenville beer," and was shipped from Steubenville, Ohio, to Primrose, Pennsylvania, but further than this the jury were told nothing about who owned the beer before it left Ohio, neither was there evidence to support the claim that the defendant was the agent of the club in buying beer from some one in

Ohio who shipped it to the club. The fact that he gave the representative of the club a receipt for the \$45 that was paid in advance on the beer and agreed in that receipt to deliver the beer to the club on March 5, 1908, the fact that the beer was consigned to him, the fact that he paid the freight, the fact that he delivered it with his own wagon or in the one he had for the time being under his control and the fact that he was admittedly a "beer agent" engaged in soliciting business for those who sell beer, all negative the idea that this transaction was anything other than a sale, he being the vendor and the steward of the of the club, the purchaser.

A brewer who has a license to sell beer can, of course, have agents and employes to assist in carrying on his business, and they can, under the brewer's license, do anything that he could lawfully do, but certainly nothing more.

The first section of the act of July 30, 1897, provides among other things, "that all wholesale dealers, brewers, distillers, rectifiers, compounders, bottlers, storekeepers and agents having stores or offices in this commonwealth dealing in intoxicating liquors, either spirituous, vinous, malt or brewed, shall pay for the use of the commonwealth for each separate store, brewery, distillery, rectifying, compounding or bottling establishment or agency, an annual license fee as follows: ". . . And distillers and brewers shall be permitted to deliver their product within the county where the license is granted, and all wagons used for the purpose of delivering spirituous, malt or brewed liquors or any admixture thereof shall have marked on the side thereof the name of the licensee and the number of his license in letters and figures not less than four inches in length." And the act of assembly which provides the form in which an application for a brewer's license shall be made provides, among other things, that the applicant must set out in his application the place where his brewery or intended place of business is located.

Taking these provisions of the license law and construing them in connection with the title of the act (which is "An act to regulate and restrain the sale of intoxicating liquors") it is apparent that a brewer can-

not sell at any other place than at his brewery or the place named in his application for a license, and can (after sale at his place of business) only deliver to the purchasers the beer there sold at other points in the county in wagons which have been properly marked. If he wants to establish agencies at other points in the county to which his beer may be shipped to an agent and there sold and delivered by the agent, he must take out an additional license for each agency so established. As we said in our instructions to the brewers licensed at our last license court sales must be made at the brewery or place licensed, and delivery, actual or constructive, must be made to the purchaser at the brewery or as provided by the act of assembly in marked wagons or to a common carrier for shipment direct to him. A brewer can, as we pointed out in the opinion filed in the case of *Commonwealth v. Uikesell*, No. 70 November Term, 1904, of this court, employ persons to solicit orders to be filled at the brewery, but the delivery of the beer which passes title to the purchaser, either constructive or actual, must be at the brewery; the beer to fill a number of orders can not be shipped to the agent who took them, in a car, to be delivered by him to the purchaser at some other place. That this is the law will appear by reference to the following cases decided by the Superior and Supreme Courts: *Commonwealth v. Guja*, 28 Superior Court Report 58; *Commonwealth v. Pollak*, 33 Superior Ct. Report 600; *Commonwealth v. Tynnaner*, 33 Superior Court Report 604; *Garpracht v. Commonwealth*, 96 Pa. 449; *Commonwealth v. Holstine*, 132 Pa. 357; *Stewart v. Commonwealth*, 117 Pa. 378.

The difficulty in determining whether a sale of liquor is illegal is not because of any uncertainty in the law, but arises out of the fact that the devices to evade the law are numerous and adroit. The "Beer Agent" is one of the devices. He is located in every industrial community in the county, and wherever he is used by the brewer as a middleman to deliver to the purchasers who have ordered beer through him the beer which has been shipped to him or in his care to fill those orders, he is violating the law. Whenever he establishes a place,

whether it be in a room or freight car, or on the curb of the street, from which he delivers beer which has been shipped to him by the brewer for delivery to those who order beer through him to be delivered at their houses, he is in the eyes of the law selling beer at that point, and the license of the brewer, his principal, will not protect him even though the brewer has placed the names of those giving orders to the agent on the kegs of the beer shipped. To repeat: A brewer can sell beer only at one place and that at the place named in his application for license, and orders received by him for beer, whether directly from purchasers or from agents soliciting orders, must be filled at that place and title must pass from the brewer to the purchaser then and there. Under the provision of the act of assembly hereinbefore quoted, the beer which then belongs to the purchaser can be taken away by the purchaser himself, or it can be delivered to him by the brewer to any point in the county in marked wagons, or it can be delivered by the brewer to a common carrier to be shipped to the purchaser, but no device, however ingenious, by which the delivery of the beer is made, which passes title at any other point than the place licensed, will avail the agent or brewer in prosecutions for selling liquor without license; and where an agent takes orders from persons to deliver beer at their houses at some future date and sends those names to the brewer and the brewer puts the names of the persons giving the orders on the kegs but in place of delivering the beer to the purchasers in wagons or shipping it by common carrier direct to them he ships it to the agent or some other person at the point where the orders were taken to be there delivered to the purchasers who then pay the purchase price or have paid it in advance to the agent, would be a violation of the law.

That the case of *Commonwealth v. Hess*, 148 Pa. 98, is now authority, may well be doubted if we give due consideration to the enactment of the limitation contained in the act of 1897 giving brewers the right to deliver beer, sold by them at the brewery, to any purchasers within the county in wagons marked as therein designated. Does not

the giving of this privilege exclude by implication the right to go outside the county in which the license is granted or to use wagons not marked? And it certainly is not authority for a brewer outside of the state establishing an agency in any county of our state to take orders for and deliver beer without first obtaining a license to do so from the court of quarter sessions of that county.

And now, June 1, 1908, motion of defendant to lift sentence and grant him a new trial is overruled.

For commonwealth, *C. L. V. Acheson*.

For defendant, *A. M. Templeton*.

[From Harry Russell Myers, Esq., Washington, Pa.]

### Court of Quarter Sessions, FAYETTE COUNTY.

#### PITTSBURG COAL CO.'S APPEAL.

*Mines and mining—Notice by mine inspector—  
Appeals—Injunction—Bituminous field—  
Act of May 15, 1893, P. L. 52, sections 11  
and 14.*

No appeal lies to the quarter sessions from a mandatory notice given by the mine inspectors to a mining company in pursuance of section 11, act of May 15, 1893, P. L. 52, to make changes in the mine for the immediate protection and safety of the miners. Such an appeal can be taken only where the proceeding is instituted under section 14 of the same act.

No. 298 December Sessions, 1907. Appeal of Pittsburg Coal Company from decision of mine inspectors. Motion of mine inspectors to strike off appeal.

Opinion by VAN SWEARINGEN, J. Filed February 25, 1908.

The question for determination here has never been decided. The case comes before the court on a motion to strike off an appeal of the Pittsburg Coal Company to the court of quarter sessions from what it claims is a decision of the mine inspector of the Nineteenth bituminous mining district of Pennsylvania, under section 1, Art. 14, of the act of May 15, 1893, P. L. 52, entitled "An act relating to bituminous coal mines, and providing for the life, health, safety and welfare of persons employed therein."

On January 27, 1908, William M. Kelvington, superintendent of Banning No. 1 Mine, operated by the Pittsburg Coal Company, in Perry township, Fayette county, received a communication, dated January 24, 1908, signed by the mine inspectors of seven different bituminous mining districts in the western part of the state, including the inspector of the Nineteenth bituminous district, in which said mine is located. The communication is as follows:

"You are hereby notified that the undersigned inspectors of bituminous coal mines have proceeded to Banning No. 1 Mine, in Perry township, Fayette county, Pa., where the danger is alleged to exist, and on January 22 and 23, 1908, have examined into the matter, and, after a full investigation of the said mine, we, being all of the inspectors making such examination, are agreed in the opinion that there is immediate danger therein, arising from its gaseous condition and lack of proper ventilation, the use of open lights, and from deposits of coal dust, which endanger the lives, health and security of the miners employed therein. And you are hereby instructed to remove such conditions forthwith and provide at least two hundred thousand (200,000) cubic feet of air per minute at the inlet or inlets of said mine, and have the said air properly and constantly circulated through all the working places, main entries and cross entries, so as to dilute and carry off and render harmless the noxious and dangerous gases generated therein; to work said mine exclusively with locked safety lamps; to install and maintain a sufficient water system, and to thoroughly water and keep wet the sides, roof and floor of all working places, main entries and cross entries, and to thoroughly water, as herein directed, all working places for a distance of not less than one hundred (100) feet back from the working face immediately before any shot or shots are fired; otherwise we shall be obliged to apply to the court of common pleas of the county of Fayette for an injunction to suspend the work in and about said mine, in accordance with the provisions of section 1, Art 11, of the act of assembly approved May 15, 1893, entitled "An act relating to bituminous coal mines, and providing for the

lives, health, safety and welfare of persons employed therein."

Alleging that this communication was in fact a decision of the mine inspector of that district, under article 14 of the act, and that the orders and directions contained in said communication are not called for under the true intent and meaning of the bituminous mine law and its supplements, and are not called for by any danger threatening the lives, health and welfare of the persons employed in said mine, and that to observe and follow said orders and directions would be burdensome upon the company in the extreme, and would entail great loss and waste of outlays already made, and would practically suspend the ordinary, fair and reasonably safe operation of the mine, the Pittsburg Coal Company appealed, and asks the court to determine the question involved in said decision and appeal, and alleges that it stands ready to assist the court in any examination of the mine and the complaint of the inspectors which the court may order through such practical, reputable, competent and disinterested persons as under the act of assembly the court may be willing to appoint, and prays that the court will appoint three such persons to forthwith examine such mine and said case of complaint under the instructions of the court and make report thereon as required by law.

The mine inspectors, through their counsel, now move to strike off said appeal for the reason that the communication signed by the inspectors was but a notice under section 1, Art. 11, of the act, and was not a decision under article 14 thereof; that the appeal was based on section 1, Art. 14, and does not apply to the matter from which it was taken; that section 1, Art. 11, provides a remedy for a specific condition, that of immediate danger to life or health of employes in the mine, and having in itself a sufficient statutory proceeding, that proceeding is exclusive and no appeal lies under article 14.

Section 1, Art. 11, of the act, so far as pertinent to this inquiry, reads as follows: "In case, however, where, in the judgment of the mine inspector of the district, any mine or part of mine is in such dangerous condition as to jeopardize life or health, he



shall at once notify two of the mine inspectors of the other districts, whereupon they shall at once proceed to the mine where the danger exists and examine into the matter, and if, after full investigation thereof, they shall be agreed in the opinion that there is immediate danger, they shall instruct the superintendent of the mine in writing to remove such condition forthwith, and in case said superintendent shall fail to do so, then they shall apply, in the name of the commonwealth, to the court of common pleas of the county, or, in case the court shall not be in session, to a judge of the said court in chambers in which the mine may be located, for an injunction to suspend all work in and about said mine, whereupon said court or judge shall at once proceed to hear and determine speedily the same, and, if the cause appear to be sufficient after hearing the parties and their evidence, as in like cases, shall issue its writ to restrain the working of said mine until all cause of danger is removed."

Section 1, Art. 14, of the act reads thus: "The mine inspector shall exercise a sound discretion in the enforcement of the provisions of this act, and if the operator, owner, miners, superintendent, mine foreman, or other persons employed in or about the mine as aforesaid shall not be satisfied with any decision the mine inspector may arrive at in the discharge of his duties under this act, which said decision shall be in writing signed by the mine inspector, the said owner, operator, superintendent, mine foreman or other person specified above shall either promptly comply therewith, or within seven days from the date thereof appeal from such decision to the court of quarter sessions of the county wherein the mine is located, and said court shall speedily determine the question involved in said decision and appeal and the decision of said court shall be binding and conclusive."

Section 2, Art. 14, provides: "The court or the judge of said court in chambers may, in its discretion, appoint three practical, reputable, competent and disinterested persons, whose duty it shall be, under instructions of the said court, to forthwith examine such mine or other cause of complaint and report, under oath, the facts as they exist

or may have been, together with their opinions thereon, within thirty days after their appointment. The report of said board shall become absolute unless exceptions thereto shall be filed within ten days after the notice of the filing thereof by the owner, operator, mine superintendent, mine foreman, mine inspector and other persons, as aforesaid, and if exceptions are filed the court shall at once hear and determine the same and the decision shall be final and conclusive."

It is argued by counsel for the Pittsburg Coal Company that the language of the communication signed by the mine inspectors is so strong that it amounts to a decision under article 14 of the act, and that the company would not be safe if it had failed to appeal from it as a decision of the mine inspector of the district, under penalty of having it enforced against the company as a decision under article 14 after the time for appeal had expired. On the other hand, counsel for the mine inspectors disclaim any intention of considering the communication as a decision under article 14, but aver the purpose of it to be but a notice under article 11.

The purpose of these two articles of this act seem to be entirely different. The provisions of article 11 apply only when conditions in the mine are such as to jeopardize life or health. In such case action must be taken at once by the mine inspector of the district in which the mine is located; he must notify two of the mine inspectors of the other districts, and he and they, acting together, shall then examine into the matter, and if, after full investigation thereof, they shall be agreed in the opinion that there is imminent danger, they shall notify the superintendent of the mine in writing to remove such condition forthwith, and in case the danger is not forthwith removed the mine inspectors shall then have the right to apply to the court of common pleas, or a judge thereof, for an injunction to suspend all work in and about the mine until such danger is removed. It is a matter demanding immediate action and requiring immediate results, to protect the lives and health of the miners. Many cases may occur where it is absolutely necessary that these results be obtained within a few hours.

Such results would be impossible if the mine owners or operators should have the right to consider for seven days the matter of an appeal, and should then require the court, possibly during its busiest sessions, to make an investigation into the matter alleged by the mine inspectors, or appoint three persons under the act to make the investigation, who would have thirty days in which to make their report, which report would not then become absolute until ten days thereafter, even if no exceptions were filed, and if exceptions were filed, then the court would be required to pass upon the exceptions before anything definite could be determined. In this way more than six weeks' time might and probably would be consumed after the investigation and notice by the mine inspectors before a determination as to the dangerous condition of the mine could be obtained. Such cannot be the intention of the act.

The directions and instructions in the notice from the mine inspectors in this case as to the manner in which the alleged danger shall be removed, and as to what shall be done to put the mine in safe and proper condition, are to be considered merely as suggestions or recommendations from the mine inspectors who examined the mine. The company is not bound to follow out these directions and instructions. The company is at liberty to use any other method or means that it may see fit to adopt to put and keep the mine in a safe condition. The only result to be obtained is the safe condition of the mine for the workmen employed therein. If, in the opinion of the officers of the company, the condition of the mine is not dangerous, and they are willing to stand on that opinion, the company need take no action whatever on the notice from the mine inspectors. The matter can then be determined by an application by the mine inspectors for an injunction to suspend the work in and about the mine until the alleged danger is removed.

The fact that in this case six mine inspectors of the other districts were notified by the inspector of the district in which the mine is located, and that they all joined with him in the examination of the alleged dangerous condition of the mine, does not

in any way affect the case or invalidate the proceedings under article 11. The act requires the notification of but two inspectors of other districts who shall assist in making the examination and investigation, but it does not prohibit the notification of more than that number, and the fact that more than that number act in the matter cannot prejudice the rights of any of the parties concerned. It is of benefit and not harm, as tending to secure a better and sounder judgment as to the real condition of the mine relative to danger to the lives or health of those employed therein.

Article 14 of the act is not intended to apply to a condition of imminent danger at the mine. Its provisions are too slow. It is intended to provide a plan for review by the courts of the decision of the mine inspector of the district wherein the particular mine is located in matters of operation and regulation other than that of immediate danger to the lives or health of the miners. It does not apply in cases where three mine inspectors, under authority of article 11, give notice as to imminent danger to life or health at the mine. The notice, in this case, given by the mine inspectors to the superintendent of the mine, by its language as well as by its positive averment at the close, shows that the inspectors were proceeding under article 11.

These two methods of procedure are applicable respectively and separately to the two articles of the act under consideration. The matter of decision and appeal applies only to article 14, and the matter of notice and injunction applies only to article 11. The remedy in the one case is the court of quarter sessions, and in the other it is in the court of common pleas.

Each of these articles of the act has its own method for the enforcement of its provisions, and this method in each case must be taken as conclusive. "In all cases where a remedy is provided, or duty enjoined or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued." Act of March 21, 1806, Sec. 13, 4 Sm. 332; 1 Purdon's Digest, 13th Ed., 271. "When a statute creates a right and provides a particular mode by which it may

be vindicated, no other remedy than that afforded by the statute can be enforced." *Borough of Beltzhoover v. Gollings*, 101 Pa. 293. "In all cases in the courts where the authority to proceed is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be strictly complied with, or the proceedings will be utterly void." *Harris v. Mercur*, 202 Pa. 313; *Norwegian Street*, 81 Pa. 349.

Applying the above rule to this case, it is clear that an appeal to the court of quarter sessions from a notice preliminary to an application for an injunction in the court of common pleas, and especially when the appeal is taken in direct opposition to the provisions of that article of the act under which the proceedings in this case are instituted, confers no jurisdiction upon the court of quarter sessions, and consequently the appeal and all proceedings thereon would be absolutely void. "It has been repeatedly held that courts have no dispensing power, even in matters of practice, when the legislature has spoken." *Harris v. Mercur*, supra. Consequently there is nothing for the court to do but to strike off this appeal.

And now, February 25, 1908, for the reasons set forth in the opinion herewith filed, it is ordered that the appeal in this case be and the same is hereby stricken off.

For mine inspectors, *D. M. Hertzog* and *John E. Kunkle*.

For coal company, *Howell, Sturgis & Morrow*.

[From D. W. McDonald, Esq., Uniontown, Pa.]

The right of a lien creditor to enforce his lien after a discharge of the debtor in bankruptcy is sustained in *Flint v. Chaloupka* (Neb.) 111 N. W. 465, 13 L.R.A. (N.S.) 309, in harmony with the great weight of authority.

The liability of a depositor to whom an insolvent bank has paid a check in the usual course of business is denied in *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L.R.A. (N.S.) 185, where the depositor had no notice of the bank's insolvency.

Ignorance of the intoxicating character of a beverage sold is held, in *Haynes v. State* (Tenn.) 105 S. W. 251, 13 L.R.A. (N.S.) 559, to be no defense to a prosecution for selling intoxicating liquors without a license.

The right to consider the obstruction of surface water as an element of damages in eminent domain proceedings for a railroad right of way is sustained in *Arkansas Valley & W. R. Co. v. Witt* (Okla.) 91 Pac. 897, 13 L.R.A. (N.S.) 237.

The novel question of the right of a tenant to lease the outside wall of the building to a third person for advertising purposes is decided against the tenant, in *Louisville Gunning System v. Parks*, 31 Ky. L. Rep. 917, 104 S. W. 331, 13 L.R.A. (N. S.) 587.

The liability of the supreme tent of an unincorporated fraternal beneficiary order for injuries received by a candidate in the performance of those ceremonies which generally accompany his initiation, which are conducted by the officers of a subordinate tent, is sustained in *Thompson v. Supreme Tent*, K. M. 189 N. Y. 294, 82 N. E. 141, 13 L.R.A. (N.S.) 314.

In the case of *Matter of Lufty*, 19 Am. B. R. 614, it appeared that attachments were levied on property of a debtor, which was taken possession of by a sheriff, and thereafter a sheriff's jury found the property to belong to a third party, and the first attaching creditor withdrew his attachment, and meanwhile a petition in bankruptcy had been filed against the debtor, and both the claimant and the sheriff had notice thereof prior to the delivery of the property to the claimant. It was held that such delivery was in derogation of the bankruptcy proceedings; and that the bankruptcy court would order the goods, or their value, to be returned to the receiver in bankruptcy.

The right to set up by cross bill inequitable conduct of plaintiff in respect to subject-matter not involved in the original bill is denied in *Peters v. Case* (W. Va.) 57 S. E. 733, 13 L.R.A. (N.S.) 408.

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PITTSBURGH, PA., JULY 1, 1908.

## Court of Common Pleas No. 2, ALLEGHENY COUNTY.

**McDonald, Trustee, St. Thomas' Roman Catholic Congregation of Brad-dock v. Monongahela Cemetery Co.**

*Cemetery—Sales of lots—Division of proceeds—  
Commissions—Sale of part of cemetery.*

A cemetery company may make an agreement to give a church one-half the proceeds of the sale of lots in a part of the cemetery. Such an arrangement is not a division of income from cemetery purposes but is in the nature of a commission for making sales.

A cemetery company may sell off a part of the land it has purchased for cemetery purposes provided the rights of lot owners are not infringed.

No. 207 January Term, 1908. In Equity.  
Opinion by SHAFER, J. Filed June 8, 1908.

The bill is for an account and for specific performance of contract to convey lots belonging to the defendant company.

### FINDINGS OF FACT.

1. The defendant company was incorporated February 24, 1883, in the Common Pleas of Allegheny county, under the corporation act of April 29, 1874, for the purpose of maintaining a public cemetery. The charter provides that the company shall have power to purchase land, to divide it into suitable plats and burial lots, to sell and dispose of the same for the purpose of sepulchre to individuals, societies or congregations, and that the income of the corporation, after paying for the land, shall be applied to the improvement of the cemetery and its perpetual maintenance.

2. The defendant company thereupon purchased from various persons contiguous tracts of land containing in all about 65

acres for the purpose of a cemetery and proceeded to improve the same and sold lots therein for burial purposes.

3. Thereafter, on October 16, 1883, an indenture was made between the defendant company and the Very Rev. John Hickey, rector for and in behalf of St. Thomas' Roman Catholic congregation, being Exhibit A of the bill, whereby the cemetery company granted, bargained and sold to the rector and his successors on behalf of the congregation a certain tract of land described by metes and bounds, containing 18 acres, being part of the lands purchased for cemetery purposes by the company, said lands to be thereafter known as St. Thomas' Roman Catholic cemetery. The agreements provides that the cemetery company shall lay out in sections, lots and graves, plant shrubs and otherwise ornament, not exceeding five acres of this land at a time as the demand for burial places might require, the average price of the lots being fixed at from \$25 to \$50 with power in the rector of the church to increase or diminish this as should be deemed expedient. It is then agreed that when lots are sold in the St. Thomas' division of the cemetery the cemetery company is to receive one-half the proceeds of such sale and the congregation the other half, to be paid over monthly. It is further agreed that the cemetery company will at any future time make a deed in fee to the church for all the unsold and unoccupied portion of the St. Thomas cemetery upon the payment of \$1,000 per acre and an equitable adjustment of the improvements made and the money expended on the same, and also that they will deed in fee simple that portion of the cemetery in which interments have been made and paid for up to that date, the Monongahela Cemetery Company thereafter to relinquish all claims to control in any way of lots in St. Thomas' cemetery, the St. Thomas cemetery, however, reserving right of way over all the avenues and streets in the rest of the company's ground; and it is further provided that when all the bonds and monies invested in the purchases and improvements of the Monongahela Cemetery Company have been paid and redeemed, then the company without any further payment will convey to St.

Thomas' church in fee all the lots remaining unsold in the 18 acres; and further that the cemetery company will give one acre as a burial place for the poor of St. Thomas and other neighboring churches, being Catholics, and that the cemetery company will not sell burial privileges to any persons except such Catholics as shall first have permits from the pastors of either St. Thomas or St. Joseph Roman Catholic churches.

4. Shortly thereafter the 18 acres above mentioned was dedicated as a cemetery according to the rights of the Roman Catholic church, and it has ever since been used as a burying place by the congregation for its members and others, and a large number of lots have been sold, a large number of persons buried and many costly monuments and improvements erected by the lot holders, members of the church.

5. The debt of the cemetery incurred for the purchase of the land and the improvements thereon is over \$100,000.

6. No accounting has ever been had between the parties of the proceeds of sales of lots in the St. Thomas division of the cemetery, although various communications were had between the parties in regard to the same. It is claimed by the defendants that in 1897 it was agreed that the contract between the parties in regard to these lots should be abandoned and cancelled, that all money then in the treasury of the company and thereafter to be realized from the sale of lots should be applied to the debts of the company, the reason alleged for this contract being the threatened insolvency of the company and appointment of a receivership. This allegation the defendant has failed to prove. The testimony offered in support of it is that of Mr. Corey, the president, as to conversations had with Father Hickey, rector of the church. It seems very probable that the financial situation of the cemetery company discussed between the parties was one reason at least for the delay of the congregation in calling for an account, but it does not appear that either Mr. Corey, as president of the company, or Father Hickey, as rector of the church, were authorized to annul the contract for the company and the congregation respectively, and even if they were, the testimony is too vague and in-

definite as to what was said and done to justify a finding that the contract was in any way abandoned or surrendered.

7. A large number of sales of lots have been made by the cemetery company in the St. Thomas' division above mentioned for which moneys have been received by the cemetery company and no part of the purchase money paid to the congregation, and a considerable credit therefore stands upon the books of the cemetery company in favor of the congregation if the contract is to be carried out.

#### CONCLUSIONS OF LAW.

1. The defenses set up to the bill by the defendant are substantially: First, that the contract in question had been modified or abandoned; and second, that it is *ultra vires*. The finding of fact that there was no modification or abandonment of the contract, if correct, disposes of the first.

2. It is claimed that the contract is *ultra vires* because the payment of one-half of the proceeds of the sale of lots in the St. Thomas division to the congregation is a diversion of the income from cemetery purposes, and that the conveyance in fee of such part of the 18 acres as is not actually used for burial purposes by the congregation on payment of the \$1000 per acre is a diversion of part of the lands from the use to which they were dedicated.

3. As to the first of these claims that the company has no right to divert from cemetery use any part of the proceeds of the sale of lots, we are of the opinion that the cemetery company has power to sell its lots, provided they are sold for burial purposes, for any price it can procure for the same, and that it has a right if it thinks proper to do so to agree to pay a commission or share of the purchase price to an agent for sale or any other person or body in a position to increase the sale of lots and bring customers which it would not otherwise have, and that the arrangement therefore to pay one-half of the proceeds of sales of certain lots to a Catholic church whose members were to be the purchasers is not *ultra vires*.

4. The defendant claims that the cemetery company is a quasi public corporation, and that when it has once purchased a tract

of land and opened it for cemetery purposes, it is incapable of selling any part of it except for burial purposes. This we do not understand to be the law. There seems to be no reason why a cemetery company may not sell its land as well as any other corporation, provided it does not infringe upon the rights of the grantees of burial privileges. There seems to be no reason why it may not sell parts of its land not used for burial purposes, so long as the sale proposed does not deprive the lot holders of the use of and reasonable access to their lots or interfere with the integrity of the cemetery as a burial place. It is not claimed in this case that the sale in question does any of these things, and the only objection to the sale of the unoccupied portions of the 18 acres that could be made would seem to be by the lot holders in that part of the cemetery who might object to the lots immediately surrounding their lots being sold, but we have here no such objection.

5. The deed in question has been discussed by counsel on both sides as a purely executory contract and some parts of it speak as if that were the intention of the parties. It will be observed however that the operative part of the deed is not an agreement to sell the 18 acres to the congregation, but is a formal and complete conveyance by the usual technical words for that purpose, in the present tense, from the cemetery company to the church. The other parts may be treated as a provision for the payment of the purchase money, the conveyance being made not for any specified purchase money, but "for and in consideration of the payments and conditions hereinafter mentioned to be fulfilled strictly and lawfully made by the parties of the second part."

6. Even if the contract were ultra vires, it does not now lie in the power of the defendant to allege that as a defense, it having for a long time acted upon the contract and reaped the benefits of it and having in its possession the fruits of it.

7. We are of the opinion, therefore, that the plaintiff is entitled to an account of the proceeds of sales of lots made by the cemetery company in the 18 acres designated as St. Thomas' cemetery, in order that there

may be ascertained what amount, if any, is due from the cemetery company to St. Thomas' congregation on account of the sale of lots and to a decree for the payment thereof; and further to an account of the moneys expended by the cemetery company for improvements upon or connected with the St. Thomas' cemetery, in order that the equitable share of such improvements made and money expended on said land may be ascertained; and further to a decree for specific performance of the contract for the conveyance or further assurance to the congregation of all the unsold and unoccupied portion of said St. Thomas' cemetery on payment of \$1,000 per acre, and an equitable share of the improvements made and money expended on the same, without making payment, however, for such part of the one acre set aside for burial of paupers as is not already occupied, and to a like conveyance without further payment of that portion of the said St. Thomas' cemetery in which interments have been made and paid for, together with the rights of way in said deeds reserved over the other portions of the Monongahela Cemetery Company's land, and that each of the parties pay one-half the costs.

(Common Pleas No. 2, Allegheny Co.)

### **MAY, Trustee, v. MONONGAHELA CEMETERY CO.**

*Corporation—Suit—Intervention by stockholder.*

A stockholder cannot intervene in a suit against the corporation without showing he has requested the corporation to make proper defense and that it has refused to do so.

No. 206 January Term, 1908. Sur petition of A. O. Tintsman to be allowed to intervene.

Opinion by SHAFER, J. Filed May 11, 1908.

The bill is for specific performance of a contract alleged to have been made between the cemetery company, defendant, and the plaintiff, to convey to the plaintiff a considerable part of the land devoted to cemetery uses belonging to the defendant. The petitioner, A. O. Tintsman, is a member of

the defendant company and a lot owner in its cemetery, and he asks leave to intervene as a party defendant, that he may file a cross-bill or answer for the purpose of protecting his interest, alleging that the contract which it is sought to enforce was one which the cemetery company had no right to make, and the enforcement of which would be prejudicial to his rights as a lot owner. The plaintiff objects to the granting of this petition that the petitioner does not show that he has requested the corporation itself to make the defenses which he proposes to make, and does not show how he would be injured as a lot owner if the contract in question were carried out. This case is set down for trial on bill, answer and replication, and from the pleadings it appears that the plaintiff is seeking to enforce a contract made almost twenty-five years ago, the general object of which is to turn a part of the cemetery in question into a Roman Catholic burying ground for a particular congregation, and the money received from the sales of lots in that particular part of the cemetery to be divided equally between the cemetery company and the congregation; and a further agreement that upon the payment of a certain sum per acre the cemetery company would convey that portion of the cemetery to the congregation. The bill is for an account of moneys received for the sale of lots and for specific performance of the agreement to convey, and the defense set up in the answer is substantially that the contract alleged is ultra vires and void.

We are unable to see how the rights of the petitioner as a lot owner can rise higher than those of the company itself. If the company declined to set up the ultra vires character of the contract upon his demand that it should do so, there might be some reason for allowing him to intervene, but the company sets that up fully in its answer. We are of opinion that the petitioner has not shown any sufficient reason for being allowed to become a defendant, either for himself or on behalf of any others who might wish to join him, and the petition is therefore dismissed.

(Common Pleas No. 2, Allegheny Co.)

**May, Trustee, St. Joseph's Roman Catholic Congregation of Braddock v. Same.**

No. 206 January Term, 1908. In Equity. Opinion by SHAFER, J. Filed June 8, 1908.

The bill is for an account and for specific performance of contract to convey lands.

#### FINDINGS OF FACT.

1. The bill herein was filed with a similar bill by another Catholic congregation of Braddock against the same defendant at No. 207 January Term, 1908, the two cases having been tried together by the same counsel, the facts in each case being, with one or two unimportant variations, identical, and the questions of law and fact disputed between the parties completely identical. We have not therefore deemed it necessary to duplicate the findings of fact and conclusions of law already filed in that case.

2. The deed between the parties in the present case conveys about five acres of land belonging to the cemetery company, adjoining the 18 acres described in the deed, conveyed to St. Thomas' church, and in question in the case above mentioned. The deed contains no provision for any land to be given gratuitously for the burial of paupers as does the deed to St. Thomas' church. In all other respects, so far as we can find, the deed which is printed as Exhibit A of the bill, is identical in effect with the deed to St. Thomas' church above mentioned, and we find the facts of this case to be, except as to the description of the land and the omission in the present case of any agreement for paupers, the same as in the case of St. Thomas' church, and the conclusions of law in that case are fully applicable to this.

3. We are of the opinion, therefore, that the plaintiff is entitled to an account of the proceeds of sale of lots made by the cemetery company in the five acres designated as St. Joseph's cemetery, in order that there may be ascertained what amount, if any, is due from the cemetery company to St. Joseph's congregation on account of the sale of lots and to a decree for the payment thereof;

and further to an account of the moneys expended by the cemetery company for improvements upon or connected with St. Joseph's cemetery, in order that the equitable share of such improvements made and money expended on said land may be ascertained; and further to a decree for specific performance of the contract for the conveyance or further assurance to the congregation of all the unsold and unoccupied portion of said St. Joseph's cemetery on payment of \$1,000 per acre, and an equitable share of the improvements made and money expended on the same, and to a like conveyance without further payment for that portion of the said St. Joseph's cemetery in which interments have been made and paid for, together with the rights of way in said deeds reserved over the other portions of the Monongahela Cemetery Company's land, and that each of the parties pay one-half the costs.

For plaintiff, *Charles D. Gillespie.*

For defendant, *Joseph F. Mayhugh.*

(Common Pleas No. 2, Allegheny Co )

# **ROBERTSON v. PAUL et al.**

*Agency—Real estate—Re-sale—Profits.*

Where a real estate agent effects a sale and afterwards becomes interested in the property and makes a re-sale at an advanced price to parties not in contemplation at the time of the first sale, the original owner has no claim on the profits.

No. 682 January Term, 1908. In Equity.

Opinion by SHAFER, J. Filed June 15, 1908.

The bill is to require the defendants to account for the proceeds of the sale of land received by them upon an alleged breach of the duty owed by them to the plaintiff in respect to it.

## **FINDINGS OF FACT.**

1. In the summer of 1906, and for some time prior thereto, the plaintiff was the owner of a tract of land containing about twenty-one acres in Leet township, Allegheny county, bordering on the Ohio river at the mouth of Big Sewickley creek, and lying between the Ft. Wayne Railroad and the river, but not touching the railroad in any part. The land

management and control of the property was in Thomas Chester, a cousin of the plaintiff, with whom all the dealings of the defendants in regard to the land were had.

2. Sometime in the summer of 1905 there was some talk between Chester and C. G. Paul, one of the defendants, who was a real estate agent, as to the land in question, and Chester offered to sell it to Paul at a price of \$1,000 per acre, which Paul declined. There was some talk between the parties as to the employment of Paul and the commission that might be payable in case of such employment, but the matter was dropped and nothing further passed between the parties at this time, nor for a long time afterwards.

3. In the fall of 1906 William T. Lyon, one of the defendants, engaged Paul as his agent to assist in the purchasing of a tract of land for a manufacturing company with which he was connected, and in the course of his endeavors to find such a property, attention was called to the property of the plaintiff, and Paul, about December 1, 1906, went to Chester and reminded him of the talk they had had. Whereupon Chester said that he was then asking \$1,500 an acre for the property. Paul and Lyon then visited Chester and went with him to look at the land, and on December 15, 1906, an agreement was entered into between Chester, acting as agent for the plaintiff, and William T. Lyon for the purchase of the land at \$1,000 an acre, and \$1,000 hand money was paid by Lyon, and at this time it was stated by Paul to Chester that he was looking to Lyon only for commission. Shortly afterwards it was requested by Lyon and agreed to by Chester that the deed when made should be made out in the name of one, L. L. Duffee.

4. About the same time the defendant, Lyon, through Chester, purchased from one, Kaufmann, a tract of some five or six acres adjoining the plaintiff's land, and also adjoining the railroad, the intention being to unite the two together and thus make a manufacturing site connected with both the river and the railroad.

5. On December 22, 1906, application for a charter for the Leetsdale Land Company was executed, in which William T.



Lyon subscribed for seventy shares, C. G. Paul for sixty-five shares and William F. Phillips, the other defendant, for sixty-five shares. So far as appears from the evidence, the organization of this company was not in contemplation on December 15, 1906, and it is claimed by defendants that it was organized to take the properties, because Lyon was not financially able to do so.

6. In February, 1907, Paul was informed that the Zug Iron & Steel Company were looking for a manufacturing site of this nature and took up negotiations with them and sold the property, that is, the Robertson and Kaufmann tracts together, for the Leetsdale Land Company to the Zug Iron & Steel Company for the price of \$69,100, and in March, 1907, the plaintiff and Kaufmann conveyed their respective tracts to Duffee, who conveyed them to the Leetsdale Land Company within a few days thereafter, and the Leetsdale Land Company shortly after conveyed the same to the Zug Iron & Steel Company.

7. The claim of the plaintiff against the three defendants is that Paul was the agent of the plaintiff to sell the land; that the other two defendants knew this; that Paul and the other defendants had agreed together that Paul should induce the plaintiff to sell the land for less than its value; and they would then purchase it through the devise of the land company, and that they should share the profits.

We find the facts to be that Phillips knew nothing at all about the purchase until after it was made, and that Lyon supposed Paul to be his agent and knew nothing of any agency of Paul for the plaintiff; and that while there was talk between the plaintiff and defendants which might indicate that Chester looked upon Paul as acting for him, there is no evidence that Paul in any way deceived the plaintiff or knew of any better price that could be obtained for the land, nor that he had any intention at the time of the purchase of becoming an owner of the land or any part thereof.

#### CONCLUSIONS OF LAW.

1. Even if Paul is to be treated as having acted as agent of the plaintiff to sell the land, his employment as such was completely ended on December 15, 1906, when

he had brought the parties together and procured the bargain to be made between them. His subsequent joining with Lyon and others in forming a company to purchase the land is not material in this case unless it should appear that this was in contemplation when the sale was effected, and of this, as we have said, there is no evidence.

2. The combination of the tract of land belonging to the plaintiff with that of Kaufmann, which connected it with the railroad, undoubtedly made the whole much more valuable than either part was before, and the parties making the purchase were taking the risk of being able to consummate both the sales and unite the two properties, and the advanced price which they obtained, so far as appears from the evidence, is to be attributed to this successful combination rather than to any concealment or misrepresentation of value by Paul. It does not appear therefore that the plaintiff has been injured in any way.

The bill should be dismissed with costs. Let a decree be drawn accordingly.

For plaintiff, *Carpenter & Chalfant*.

For defendants, *Stone & Stone*.

### Court of Common Pleas,

ELK COUNTY.

#### RIDGWAY GRAIN CO. v. PENNSYLVANIA RAILROAD CO.

*Carriers—Actions—Affidavit of defence—Practice (C. P.).*

Where a common carrier wrongfully delivers goods shipped upon a bill of lading the shipper may waive the tort and bring his action in assumpsit for breach of contract, and in such case he is entitled to all of the incidents of such action including an affidavit of defence.

No. 130 January Term, 1908. Rule for judgment for want of affidavit of defence.

Opinion by HALL, P. J. Filed April 6, 1908.

This is an action of assumpsit brought to recover damages for breach of certain written contracts, known as bills of lading, whereby the defendant company for a stipulated consideration agreed to accept transport and

deliver seventeen different shipments of grain consigned to various persons or their order at terminal points on the lines of the defendant company.

The defendant claims that the action is one in its nature *ex delicto* and, therefore, no affidavit of defence is required and cites the case of *Corry v. Penna. R. R. Co.*, 194 Pa. 516, to the effect that, "Under the act of May 25, 1887, the actions of *assumpsit* for which judgment may be taken for want of an affidavit of defence are limited to such as are founded on contract alone, and do not include cases in which the cause of action is *ex delicto*, or of a mixed character of contract and tort." This is a proposition of law which may not be denied, but the case cited was one where the plaintiff intended to become a passenger but before buying her ticket sent her trunk to the defendant's station, where it was so negligently and carelessly kept that before her arrival to pay her fare it was rifled of its contents, and the court held that under such circumstances the careless keeping of the trunk before the plaintiff became a passenger was necessarily the subject of an action on the case for damages for negligence which is essentially an action *ex delicto*, since there was as yet no contract between the plaintiff and the defendant company. Mr. Chief Justice Green, in his opinion in that case, said: "According to the plaintiff's statement of her cause of action she had not assumed the relation of passenger and carrier with the defendant at the time of the loss of her goods. . . . At the time the articles were taken she had not become a passenger, and hence the company never did undertake to carry her and her missing baggage to her destination. It follows that the cause of action could not be founded upon a contract to carry the plaintiff and her missing articles to her destination, and hence the loss of them is not a breach of a contract of carriage." Referring to the act of 1887, he further says: "It seems to us quite clear that it was intended to limit the actions of *assumpsit* for which judgment may be asked for want of an affidavit of defence to such only as were founded upon contract alone. There is nothing in the language of either section

which contemplates cases in which the cause of action may be *ex delicto* or of a mixed character containing an element of contract and an element of tort. The plain inference from the language of both sections is that it was the intention of the legislature to limit this remedy to causes of action which were either actually in writing or contracts the whole details of which could be plainly set down in writing, with particular terms and limitations, so that a liability for the payment of a definite sum of money could be expressed."

There is a clear distinction between that case and the present one for the reason that in the present case in each instance the defendant company is alleged to have executed or become privy to a written contract with the plaintiff for a valuable consideration before accepting the goods for shipment, and the action is brought expressly to recover damages for the breach of such contracts, which damages consists clearly in the liability for the payment of a definite sum of money, to wit: the amount of the drafts attached to the several bills of lading which the plaintiff would have received prior to the delivery of the goods if the contracts had not been violated.

The plaintiff's statement consists of seventeen separate counts, each for a shipment of grain, with a single exception consigned to the order of the shippers or to some other person. In one case only, which is set out in the fourth count, the shipment was made to the "Ridgway Grain Company" without the use of the word "order."

A bill of lading was issued in every case, and each of the bills of lading contain a condition to the effect that if the word "order" was written immediately before or after the name of the party to whose order the property was consigned, the surrender of the bill of lading should be required before the delivery of the property. And in the single case where the word "order" was not so written it is alleged that the property was consigned to the Ridgway Grain Company, at Philipsburg, Pa., but was wrongfully delivered to some person other than the consignee.

Eight of these bills of lading were issued by the Pennsylvania Railroad Company;

one was issued by the Empire Line, which is styled therein as "a fast freight line owned and operated by the Pennsylvania Railroad Company;" one was issued by the Erie and Western Transportation Company, which has thereon the words, "Anchor Line, Lake and Rail Line of the Pennsylvania Railroad Company." The other seven bills of lading were issued by different railroad companies.

In the plaintiffs' statement, so far as the same relates to shipments destined to Philipsburg and for which bills of lading were issued by the Pennsylvania Railroad Company, an express contract, requiring delivery only upon surrender of the original bill of lading, is alleged. The plaintiffs' statement, so far as the same relates to shipments destined to Ridgway and for which bills of lading were issued by the Pennsylvania Railroad Company, sets forth a reconsignment thereof to Philipsburg, and that the Pennsylvania Railroad Company, with notice of the form of consignment and knowledge of the significance thereof, undertook and agreed to deliver only upon surrender of the original bill of lading. Where bills of lading were issued by other railroad companies the statement alleges that delivery was made to the Pennsylvania Railroad Company on the route to destination, and that the latter, with notice and knowledge aforesaid, undertook and agreed to deliver only upon surrender of the original bill of lading. In each case a consideration for the said undertaking and agreement is alleged, namely, a certain hire or reward, or a proportionate part thereof, in said bill of lading mentioned, and in each instance the plaintiffs allege that they drew their draft for the value of said shipment, naming a specific sum, endorsed and attached to said bill of lading, and forwarded said draft with bill of lading attached and endorsed as aforesaid through the regular banking channels for collection. It follows that possession of the bills of lading could only have been obtained by the payment of the drafts attached thereto, and if the contracts contained in these bills of lading had been carried out, not to deliver the goods until the original bill of lading was presented, or in the one instance mentioned in count four,

if it had not been delivered to any other parties than the consignee, the plaintiffs would have received the value of the goods represented by the amount of these drafts before delivery was made; but the defendant company having delivered the goods to parties other than the consignee without their order and without the production of the original bills of lading by the parties to whom the goods were delivered, would be liable to the plaintiffs for the value of the goods represented by the amount of the drafts as aforesaid as damages for violation of its contract.

As it must be conceded that no affidavit of defence is necessary in any action purely *ex delicto*, or on a statement showing two causes of action, one *ex contractu* and the other *ex delicto*, or in a mixed action where the case is partly *ex contractu* and partly *ex delicto*, it becomes important for us now to consider whether the plaintiffs' statement in the present cause of action does or does not disclose a cause of action purely *ex contractu*, but in determining this matter we are satisfied that we must be governed by the nature of the action actually brought by the plaintiffs and not by what action they might have brought.

Judge Cooley, in his admirable work on the Law of Torts, page 2, has clearly drawn the distinction between the two forms of action: "It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of contract, and, second, those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner that puts the contract out of view. Imperfect as it is, however, the classification has been found sufficient for judicial purposes; and where forms of actions have been abolished by statute the old distinctions are still kept in view in giving redress. And while thus the common law classified wrongs, it appropriated the generic term to one class of wrongs only. Breaches of contract were mere failures to perform agree-

ments, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically wrongs, or torts, and the actions by which redress was to be obtained were called actions for torts or actions *ex delicto*."

The English common law procedure act of 1852 defines a tort as "a wrong independent of a contract."

Cooley, in his work above mentioned, at page 90, says: "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. This, at the first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty.

If one by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for tort. The tort consists in his having been, by fraud and falsehood, induced to make the purchase. There is a broken contract, but there is also something more: there is deception to the injury of the purchaser in procuring the contract to be made. Suit may be brought on the contract, ignoring the fraud; but it may also be brought for the fraud, and then the contract will not be counted on, though it will necessarily be shown in order to make appear how the deception was injurious. The tort in such case is connected with the contract only as it enabled the tortfeasor to bring the party wronged into it.

There are also, in certain relations duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. The case of the common carrier furnishes us with a conspicuous illustration. The law requires him to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and

safety; and if he fails in this there is a breach of contract. Thus for the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought."

A carrier is liable for negligence in actions *ex contractu* or in tort at the election of the party. *Smith v. Seward*, 3 Pa. 342.

The reason why this choice of form against a common carrier is permitted, is that the action requires not the aid of the contract to support it though the law will imply a contract if the plaintiff prefers. *Livingston v. Cox*, 6 Pa. 360.

To the same effect is *Porter et al v. Hildebrand*, 14 Pa. 129. In this case, in summing up a discussion of the nature of the remedy against common carriers, the court said: "All of the cases which treat of it were reviewed by the Supreme Court of New York in the *Orange Bank v. Brown*, 3 Wend. 158, and glanced at in our own cases of *Livingston v. Cox*, 6 Barr 362; *McCall v. Forsythe*, 4, W. & S. 179; and *Smith v. Seward*, 3 Barr 342. These, after referring to the right of the plaintiff to bring either assumpsit on the implied contract, or case for negligence, fully establish that the form of action selected is to be governed by the rules applicable to it, in all other instances. The difficulty frequently experienced has been in determining from the shape of the declaration, which form of remedy was adopted; but *Smith v. Seward*, following *Corbett v. Parkington*, 6 Barn. & Cress 268, ascertain the criterion to be, not only in the absence or presence of an averment of promise, but of consideration also."

To the same general effect that for a carrier's breach of duty or negligence, an action *ex delicto* or *ex contractu* will lie, at the election of the plaintiff, are *Manner v. D. and H. Co.*, 7 Pa. Super. Ct. 135, and *Eckert v. Penna. R. R. Co.*, 211 Pa. 267.

From the foregoing cases the rule may be gathered that if an action be in substance an action *ex contractu* it will be attended by the incidents of such an action, and of what avail would be the right to selection if in an action against a common carrier the plaintiff chose to disregard the tort and elected to sue in assumpsit were to be denied the incidents

belonging to that form of action.

While it is perfectly clear from the authorities above cited that in a case such as the one at bar the plaintiffs may elect under which form of action to proceed, we think it is equally clear that if they elect to disregard the tort and to proceed in an action of assumpsit upon their contract they are entitled to all of the incidents of such action and to the benefit of all of the laws by which it is governed.

There only remains to be considered whether the plaintiffs' statement sets forth such a contract as will enable them to proceed in assumpsit. The averments of promise and consideration are clear and distinct. The contract alleged, as contained in the bill of lading, has a distinct status under the law. It is both a receipt for property and a contract for delivery. The bills of lading set forth in this statement are receipts for a quantity of goods shipped and a promise of transporting and delivering the same as therein stipulated. It has been held that so far as they are receipts they may be contradicted by oral testimony, but so far as they are evidence of a contract between the parties they stand on the same footing of all other contracts in writing and cannot be contradicted nor varied by parol evidence. *The Delaware v. Oregon Iron Co.*, 81 U. S. 579; *Pollard et al. v. Vinton*, 105 U. S. 7; *St. Louis and Iron Mt. R. R. v. Knight*, 122 U. S. 79.

A bill of lading is a contract, because, like every other contract, it is governed, as to its nature, validity and interpretation, by the law of the place where it is made, unless the contracting parties clearly appear to have had some other law in view. *Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *The Henry B. Hyde*, 82 Fed. 681.

Bills of lading were considered as contracts in the following cases: *Holmes et al. v. German Security Bank*, 87 Pa. 525; *Holmes v. Bailey*, 92 Pa. 57; *Richardson v. Nathan*, 167 Pa. 513; *Friedlander v. Railway Co.*, 130 U. S. 513.

They are made negotiable by the act of September 24, 1866, section 1, P. L. 1867, 1363, which is discussed by Justice Gordon in the case of *Bucher v. Com.*, 103 Pa. 533.

We are, therefore, of the opinion that the

statement of claim sets up a contract and a breach thereof sounding in damages in a sum certain which is easily ascertainable without the intervention of a jury, and that while the plaintiffs might at their option have brought the action *ex delicto* by reason of the fact that the defendant company is a common carrier, that having waived the tort and elected to proceed in an action of assumpsit alleging damages purely for breach of contract and not for the defendant's negligence as a common carrier they are entitled to an affidavit of defence.

It is, therefore, ordered and decreed that unless a sufficient affidavit of defence be filed by the defendant to the plaintiffs' statement of claim within fifteen days hereafter that the rule for judgment in this case be made absolute, the amount to be liquidated by the prothonotary.

For the rule, *D. L. Krebs* and *E. H. Baird*.

Contra, *C. H. McCauley*.

[From *W. S. Hamblen, Esq., Ridgway, Pa.*]

In *Brunswick Construction Co. v. Burden*, 101 New York Supplement, 716, defendant sold his dwelling house to plaintiff on condition that he might "remove all fixtures attached to said premises." He subsequently carried away mantels and hinges, made to match the furniture, and parquet flooring laid over a permanent floor. In an action brought for damages to the freehold, the New York Supreme Court held that they were not distinctively realty, and refused to grant any relief.

A newspaper published a misstatement of an opinion handed down by the Supreme Court of Rhode Island. In contempt proceedings therefor the paper alleged that the error was unintentional. The court held its good intentions afforded no excuse in view of the fact that its act in attempting to state the law was purely voluntary, but allowed it to purge itself by publishing the opinion in the contempt case on its editorial page where the former article appeared. The decision is reported as *In re Providence Journal Co.*, 68 Atlantic Reporter, 428.









